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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 222

CIVIL AERONAUTICS BOARD, PETITIONER.

vs.

ARTHUR R. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, AND THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL.

No. 223

DELTA AIR LINES, INC., PETITIONER.

vs.

ARTHUR R. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, AND THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, D.C.

WRIT GRANTED FOR HABEAS CORPUS JULY 11, 1933.

REHEARING GRANTED OCTOBER 11, 1933.

Petition

Statem

Opinion

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Order

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**In the United States Court of Appeals
for the District of Columbia Circuit**

No. 11,351

JESSE M. DONALDSON, Postmaster General of the
United States, and THE UNITED STATES OF
AMERICA on behalf of the Postmaster General,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *Respondent*

Petition for Review of Order of the Civil Aeronautics Board

JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,351

JESSE M. DONALDSON, Postmaster General of the
United States,

and

THE UNITED STATES OF AMERICA, On Behalf of the
Postmaster General, *Petitioners*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

Petition for Judicial Review

*To the Honorable, the Judges of the United States Court of
Appeals for the District of Columbia Circuit:*

JESSE M. DONALDSON, Postmaster General of the United States, and THE UNITED STATES OF AMERICA, on Behalf of the Postmaster General, petitioners, respectfully present this petition for judicial review of orders of respondent, Civil Aeronautics Board, and in support thereof represent and allege the following:

I

THE FACTS AND THE STATUTE UPON WHICH JURISDICTION
IS BASED

1. This petition is filed pursuant to Section 1006 of the Civil Aeronautics Act of 1938, 52 Stat. 1024, 49 U.S.C. 646. It seeks review of orders of the Civil Aeronautics Board entered in proceedings under Section 406 of the Act, 49 U.S.C. 486, fixing mail pay for Chicago and Southern Air Lines, Inc. (Docket No. 2564, Orders No. E-5793 and E-6045, dated October 18, 1951, and January 18, 1952, respectively). This petition is filed within 60 days after entry of the Board's order of January 18, 1952, denying the Postmaster General's petition for reconsideration. Section 1006; *Braniff Airways v. Civil Aeronautics Board* (1945), 79 U.S. App. D. C. 341, 147 F. 2d 152.

2. The Postmaster General has a substantial interest in the air mail pay orders sought to be reviewed within the meaning of Section 1006 of the Act. He is a statutory party to all airmail pay proceedings before the Board, Sections 406(a) and 406(c), and as such serves as the protector of the public interest in such proceedings. *Seaboard & Western Air Lines v. Civil Aeronautics Board* (1949), 86 U. S. App. 64, 181 F. 2d 515, 518-519, certiorari denied (1950) 339 U. S. 963. The Postmaster General is required to pay air carriers for transporting air mail, out of funds appropriated by Congress for that purpose, at the rates fixed by the Board. Section 406(a). The Postmaster General participated in the proceedings before the Board in which the orders sought to be reviewed were entered, and there urged the objections raised in this petition.

II

THE NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

1. Chicago and Southern Air Lines, Inc. (C. & S.) is a certificated air carrier conducting both domestic and Latin-American operations. Service over the Latin-American routes was inaugurated November 1, 1946. Temporary airmail pay rates for these foreign operations were fixed by the Board by orders dated March 20, 1947 (7 C.A.B. 985) and May 6, 1948 (9 C.A.B. 924).

2. In July 1948, the Board fixed a final subsidy mail pay rate for C. & S.'s domestic operations effective January 1, 1946. 9 C.A.B. 786. The Board estimated that this rate would yield C. & S. a 7.4% return on its investment allocable to domestic operations. Actual operations under this rate, however, have resulted in an average annual return of 12.51% on domestic operations for the years 1948 to 1950. This is \$654,000 more than a 7.4% rate of return would have provided.¹

¹ On October 1, 1951, the Board reopened the current final mail pay rates for the domestic operations of C. & S. and six other domestic trunkline carriers. Order Serial No. E-5747.

3. On May 18, 1951, the Board issued a show cause order proposing final subsidy rates for C. & S.'s Latin-American operations. These proposed rates were retroactive for the period November 1, 1946, to December 15, 1950, and prospective from December 16, 1950. The Postmaster General filed objections to the proposed rates as excessive. He contended, *inter alia*, that the Board was required to offset the carrier's "excess" earnings on its domestic operations in determining the carrier's subsidy "need" on its foreign routes.

The Board, rejecting this contention, issued its opinion and order on October 18, 1951, fixing final mail pay rates, both retroactive and prospective, for C. & S.'s Latin-American operations.² The Board held that Section 406(b) of the Act did not require it "to reduce the carrier's mail pay with any part of [the carrier's] other revenue if there are sound reasons for not doing so as a matter of economic policy."³ The Board, in fixing the rate, determined that the carrier was entitled to a return of 7% for the past period and 10% for the future.

4. The Postmaster General filed a petition for reconsideration, which the Board denied on January 18, 1952. The administrative remedies of the Postmaster General before the Board have now been exhausted.

III

POINTS ON WHICH PETITIONERS INTEND TO RELY

1. Section 406(b) of the Act compels the Board to offset as "other revenue" the excess earnings of the carrier's domestic operations in determining its "need" for subsidy compensation when fixing mail rates for its international operations. The Board is not empowered to refuse

² The opinion and order were based upon a stipulation of facts entered into by the parties to the Latin-American mail pay proceeding.

³ This principle had been enunciated by the Board four months previously in *Western Air Lines, Inc.—Inland Air Lines, Inc., Mail Rates Case*, Order Serial No. E-5467, June 26, 1951. Petitioners are challenging in this Court the validity of that aspect of the Board's order in the *Western* case. *Donaldson, et al. v. Civil Aeronautics Board*, Docket No. 11,259, petition for review filed December 10, 1951.

to offset such excess earnings for reasons of economic policy or otherwise.

2. By failing to offset the excess earnings from the carrier's domestic operations in fixing rates for its international operations, the Board has fixed a rate which produces compensation in excess of the carrier's "need" as provided in the Act, and has allowed the carrier a rate of return in excess of the rate of return previously found reasonable by the Board.

3. The Board exceeded its statutory power or, in the alternative, abused its discretion in failing to offset C. & S.'s "excess" domestic earnings in fixing airmail pay rates on the carrier's Latin-American routes.

IV

THE RELIEF PRAYED

WHEREFORE, petitioners pray that the Board's order be modified to reduce the payments to C. & S. for the transportation of mail on its Latin-American routes by the amount that such payments fail to reflect the carrier's "excess" earnings on its domestic routes, and for such further relief as the Court may deem proper.

(Signed) H. G. Morison

H. G. MORISON

Assistant Attorney General

Department of Justice

Washington 25, D. C.

(Signed) Roy C. Frank

ROY C. FRANK

Solicitor

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(Signed) Frederick E. Batrus
 FREDERICK E. BATRUS
Assistant Solicitor

(Signed) Eugene J. Brahm
 EUGENE J. BRAHM
Chief, Air Mail Section
 Office of the Solicitor

Dated March 18, 1952

• • • • •
 115 E-5385

UNITED STATES OF AMERICA
 CIVIL AERONAUTICS BOARD
 WASHINGTON, D. C.

Served May 18 1951

Docket No. 2564

CHICAGO AND SOUTHERN AIR LINES, INC.
 Latin American Operations

In the matter of the compensation for the transportation of
 mail by aircraft, the facilities used and useful
 therefor, and the services connected
 therewith.

Adopted: May 18, 1951

Statement of Tentative Findings and Conclusions¹

BY THE BOARD:

This proceeding was instituted by petition filed October 11, 1946, by Chicago and Southern Air Lines, Inc., hereinafter referred to as C & S, for an order fixing and deter-

¹ This statement does not necessarily represent the view of all members with respect to all issues.

mining the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, over its Latin American Route.

Informal mail rate conferences² have been held with C&S in order to evaluate past operating results, claimed mail pay and estimates for a future period as submitted by the carrier.

116 In accordance with Section 302.13 of the Procedural Regulations the Board has arrived at the tentative findings and conclusions and has formulated the tentative mail rates set forth herein. Concurrently, the Board is issuing an order directing C&S to show cause why such tentative mail rates should not be established as the final rates in this proceeding.

CERTIFICATE HISTORY

This route was awarded to C&S by the decision of the Board in the *Latin American Case* on May 17, 1946, approved by the President May 22, 1946.³ The route authorized operations between the co-terminal points, Houston and New Orleans, and Havana; from Havana one leg branched to San Juan by way of Camaguey, Port au Prince and Ciudad Trujillo; a second leg extended from Havana to Caracas by way of Kingston, Aruba and Curacao. In January 1947, service to Montego Bay, Jamaica, as an intermediate point between Havana and Kingston was authorized⁴ and in the *Latin American Route Amendment Case*⁵ in March 1949, Camaguey was eliminated and Kingston instead of Havana was made the branching point of the San Juan and Caracas legs.

² Pursuant to Rule 19 of the Board's Procedural Regulations. These conferences were held on January 10-12, 17-19, and 24-26, 1951.

³ Latin American Air Service, 6 CAB 857, 927 (1946).

⁴ Service to Montego Bay, 7 CAB 741, 747 (1947).

⁵ Pan American Airways, et al., Latin American Route Amendment 10 CAB 351, 380 (1949).

The initial petition of C & S filed on October 11, 1946 requested mail pay at the rate of \$1.73 per airplane mile. A subsequent amendment requested that this be increased to \$2.17. A temporary rate of 95 cents per airplane mile was set on March 20, 1947⁶ for the New Orleans-Havana segment.

On March 30, 1948, C & S filed a new petition requesting a rate of \$1.28 per airplane mile for performing the service between Houston-New Orleans and Caracas via Havana and Kingston, and on May 6, 1948 the Board authorized mail pay at the rate of \$1.25 for this service.⁷ This latter rate has been continued until the present time.

PERIODS FOR WHICH RATES WILL BE FIXED

Service from New Orleans to Havana was inaugurated on November 1, 1946. Service from Houston to Caracas via Havana and Kingston began August 1, 1948. The carrier has never begun operations to Aruba, Curacao and Montego Bay nor from Kingston to San Juan.

Service was begun with 50-passenger DC-4's. Constellation aircraft were introduced on December 16, 1950. This four-engine service was supplemented by DC-3 operations between New Orleans and Houston during the first six months of 1949. DC-3's have been in constant use on this segment since June 1950.

The past period for which mail rates will be fixed will be that from November 1, 1946 through December 15, 118 1950, the time during which the carrier was serving most of its system with DC-4 aircraft. The future period will begin December 16, 1950, the date on which service from New Orleans south was offered with Constellation aircraft.

⁶ Chicago and Southern Air Lines, Inc., Latin American Mail Rates, 7 CAB 985 (1947).

⁷ Chicago and Southern Air Lines, Inc., Latin American Mail Rates, 9 CAB 924 (1948).

MAIL RATES FOR THE PAST PERIOD

Scheduled Service Required

The various changes effected by C&S in the pattern of its service over its international system indicate a proper concern on the part of the carrier to develop to the utmost the traffic potentialities existing on its route. The carrier's experimental efforts in this direction, at least up through June 1949, were rewarded with a continually increasing system passenger load factor. The following table sets forth the quarterly available seat-miles, passenger-miles and load factor attained by the carrier on its international system.

CHICAGO AND SOUTHERN'S INTERNATIONAL SYSTEM
QUARTERLY TRAFFIC DATA UP TO JUNE 30, 1949

Quarter Ended	Revenue Passenger Miles (000)	Standard Available Seat-Miles* (000)	Revenue Passenger Load Factor (%)
March 31, 1947	1,773	4,819	36.79
June 30, 1947	1,297	5,244	24.73
Sept. 30, 1947	1,881	5,365	35.06
Dec. 31, 1947	1,747	5,305	32.93
March 31, 1948	1,993	5,365	37.15
June 30, 1948	1,927	5,455	35.33
Sept. 30, 1948**	4,158	10,680	38.93
Dec. 31, 1948	5,118	13,957	36.67
March 31, 1949	6,117	15,087	40.54
June 30, 1949	6,954	16,276	42.73

* DC-3 @ 21 available seats; DC-4 @ 44 seats.

** Service to Caracas inaugurated August 1, 1948.

119 During this period, as indicated, the carrier's load factors steadily improved concurrently with an increase in volume of service operated.

This period of load factor improvement accompanying an increase in capacity not only indicates the success of the carrier's experiments with different types of schedule patterns, but also justified in part at least the carrier's further experimentation with its schedules. Unfortunately, after June of 1949, such experimentation did not meet with

an equal degree of success. The following table indicates that continued schedule changes by the carrier resulted in the operation of substantial amounts of excessive capacity, with a corresponding drop in load factor.

CHICAGO & SOUTHERN INTERNATIONAL SYSTEM
QUARTERLY TRAFFIC DATA 1949 AND 1950

Quarter Ended	Revenue Passenger Miles (000)	Standard Available Seat-Miles* (000)	Revenue Passenger Load Factor (%)
3/31/49	6,117	15,087	40.54
6/30/49	6,954	16,276	42.73
9/30/49	7,832	24,220	32.34
12/31/49	6,424	24,109	26.65
3/31/50	7,100	23,514	30.19
6/30/50	6,882	21,294	32.32
9/30/50	7,362	17,773	41.42

* DC-3 @ 21 available seats; DC-4 @ 44 seats.

The drop in revenue passenger load factor which occurred in the third quarter of 1949 followed a substantial schedule change effected by the carrier on June 27, 1949, when three weekly round trips were added between Houston and Caracas via New Orleans and Kingston. The resulting pattern of service represented a substantially greater volume of revenue plane miles or available seat miles than that offered by C & S at any time to that date. The carrier claims that this increase in service volume was justified on the grounds that its load factor was steadily increasing up until the end of June 1949, that competitive services of other airlines, both foreign and United States Flag carriers, to and from Caracas were improving steadily during this period and that it had no foreknowledge that Venezuelan air traffic volumes would decline markedly from the end of June 1949 forward.

An examination of the facts indicates that while there is some merit to the carrier's position, no real justification has been established for the 75% increase in capacity scheduled to and from Caracas after June 1949. Although load factors between Kingston and Caracas had increased some eight percentage points from the first to the second

quarter of 1949, the load factor for the latter quarter was only 39.8%, a level which hardly justified a substantial increase in the volume of service rendered. While it appears that competitive services existed for Caracas traffic, it has not been shown that such competition was greatly intensified during the summer of 1949; and C&S's increasing load factor on the Kingston-Caracas segment prior to June 1949 would seem to have augured well for its continuing to obtain a reasonable share of the Caracas traffic. It should be noted, finally, that the carrier is restricted from transporting local traffic between Caracas and Havana by the Venezuelan government except on three weekly round trips, a fact which it knew would limit its loads on the added frequencies.

We have stated in other mail rate cases⁸ our concern over the tendency, on the part of some of the carriers, to add schedules on part or all of their systems without having a reasonable expectation that such greater service volumes would result in added revenue greater than
121 added expenses. Such a policy on the part of the carriers can only result in increases in break-even need and need for mail pay support. Similar results are inevitable where, as here, a carrier adds substantial service volume and fails to reduce it after seeing that the anticipated changes in the balance of revenues and expenses have not materialized. Since we do not propose to underwrite such excessive volumes of service with mail pay, nor to encourage management philosophy underlying such operation, we are impelled to disallow for mail rate purposes a substantial amount of the mileage operated by C&S during the past period.

As already noted, the service operated by the carrier was clearly excessive beginning in the third quarter of 1949. Relatively low load factors continued during the next three quarters, but this condition was rectified on May 29, 1950, when the carrier substantially reduced its service volume.⁹

⁸ Capital Airlines, Inc., Mail Rates, 10 C.A.B. 705, 710 (1949).

⁹ The schedule pattern beginning May 29, 1950, totalled 32,494 miles per week, a reduction of 20% from that operated in the average week during the preceding year.

It is therefore during the approximate 11-month period ended May 29, 1950, that the capacity disallowance will be made.

We do not propose to disallow during this period all of the mileage which now, in retrospect, might be termed excessive. To do so, would, in our judgment, be tantamount to charging C&S management with possession of the gift of infallible prophecy, a responsibility which we do not read into the standard of economic and efficient management laid down in Section 406(b) of the Civil Aeronautics Act of 1938, as being required of the carriers in operations to be underwritten with mail pay.

In determining the specific amount of the disallowance, therefore, we propose to recognize a reasonable period during which the mileage operated will be recognized for mail pay purposes. The purpose of such recognition
 122 during this period is to allow C & S an experimental period, during which to test its higher service volume. The most productive schedule pattern operated by the carrier up to June 1950 in terms of load factor and load factor trend was that in effect from December 19, 1948 to June 27, 1949 consisting of approximately one and one-half weekly round trips between Houston and Havana, two and one-half between Houston and New Orleans, nine and one-half between New Orleans and Havana and giving service to Kingston and Caracas of four round trips per week. We find that the mileage operated by the carrier in excess of this schedule pattern during the year following June 1949 could be deemed excessive from the standpoint of load factors, traffic and revenues realized; but that in order to allow for a reasonable period of experimentation, only one-half of such excess will be disallowed for rate-making purposes. In effect, this finding recognizes a period of approximately five and one-half months of the mileage as actually operated, since such operation continued for a total of approximately eleven months.

In view of the fact that on May 29, 1950 the carrier evolved a schedule pattern which reduced by some 20 percent the plane miles operated in the average month during

the preceding year we find that the schedule pattern operated from May 29, 1950 through December 15, 1950 should be recognized in its entirety for mail rate purposes.

The effect of this determination is to disallow 341,000 plane miles operated by C & S up through May 28, 1950 and to recognize the plane mileage operated from that date through December 15, 1950. Appendix No. 1 compares the plane miles, standard available seat-miles, and standard available ton-miles actually operated by the carrier up through December 15, 1950 and that which has been recognized consistent with the above determination.

123 As shown in Appendix No. 1, the 341,000 miles disallowed in the past period approximates 12 percent of that operated by the carrier during the period July 1, 1949 to December 15, 1950, or seven percent of the total plane mileage operated during the entire past period through and including December 15, 1950.

Equipment

During the past period through May 28, 1950 C & S operated most of its schedules on its international system with DC-4 aircraft. In this operation the carrier averaged during the period approximately 7.6 hours per day utilization with such equipment. From May 29, 1950 through December 15, 1950 the DC-4 aircraft were utilized approximately 8.2 hours per day as well as DC-3 aircraft having a daily utilization of 8.4 hours. Even after the indicated disallowance has been made for excessive scheduling the adjusted utilization of the equipment was reasonable. We, therefore, find that the aircraft assigned to the carrier's international division were used and useful and will be recognized in their entirety for rate-making purposes.

Operating Results

While the break-even need level of C&S on a unit basis has, since the beginning of its operations, compared unfavorably with that of other carriers having similar type operations or operating in the Latin American area, the trend

in C & S's break-even need was steadily downward through June 1949. Beginning with the year ended December 31, 1949, however, and for each annual period ended with subsequent quarters C & S's break-even need trend on a unit basis was steadily increasing. This trend is shown in the following table:

Year Ended	Per Revenue Ton-Mile	Per Standard Available Ton-Mile*
	Reported Break-Even Need	
12/31/48	40.51¢	13.55¢
3/31/49	36.45	12.58
6/30/49	30.83	11.08
9/30/49	30.58	10.32
12/31/49	33.69	10.49
3/31/50	36.40	10.84
6/30/50	39.74	11.48
9/30/50	36.82	11.58

* DC-3 @ 2.4 tons; DC-4 @ 6 tons.

The relatively high level of the carrier's break-even need is in large part due to the very low traffic potential on its international system particularly that south of Havana. This is shown in Appendix No. 2 which compares the density of C & S's international system with that of seven other carriers and indicates that except for Colonial Airlines and Braniff Airways, C & S's traffic density in terms of revenue ton-miles per route mile per day was the lowest of the entire group.

The fact that the carrier's increasing break-even need after June 1949 was accompanied by relatively low unit operating expenses and declining load factors and yields indicates that revenue factors rather than unduly high operating expenses were responsible. Appendix No. 3 indicates that as the carrier increased its service volume its unit expenses on a comparative basis achieved a very low level, but that in spite of these economies its revenues declined to such an extent that break-even need nevertheless increased.

Revenues

The carrier has substantiated with factual proof its claim that over the entire period of its operations it actively resisted attempts of other carriers to reduce the general level of fares in the Caribbean area. We therefore
 125 find that it has been only as a result of C & S's attempt to meet competitive fares where necessary that its unit revenues have been steadily declining during recent years; and that therefore the level of its unit revenue yields was reasonable during the past period.

The only adjustment to operating revenues is the loss which results from the capacity disallowance previously discussed. We find, in view of the relatively constant degree of competition to which the carrier's traffic was subject, that the load factor attained by it for the year ended June 1949 (prior to the addition of the capacity found to be excessive) was a load factor reasonably attainable during the subsequent year at the same service volume. We have therefore estimated the passenger-mile volume which would have obtained without the addition of the excessive capacity during the year ended June 30, 1950, by applying the prior year's load factor to the capacity operated as of June 1949. The passenger-mile volume carried in excess of that amount is estimated as the volume which would have been lost had the excess capacity not been operated. Adjustments to reported volumes, not only of passenger-miles, but also of freight and excess baggage, are shown in Appendix No. 1.

Passenger, freight and excess baggage revenues during the past period have been reduced by \$133,000, reducing non-mail revenue from \$6,012,000, as reported by the carrier, to \$5,879,000, (Appendix No. 4) which reflects the adjustment outlined above.

Expense Adjustment for Excess Capacity

Appendix No. 4 sets forth the adjustments which have been made to the reported expense figures of C & S. The disallowance of 341,000 plane miles previously indicated

as the excessive plane miles operated during the year
 126 ended June 30, 1950 requires a reduction in the carrier's expenses. The reduction in expense in the flying operations and in the direct maintenance categories totals \$209,000 and was determined on the basis of the reported expense per revenue plane mile in these categories for the year ended June 30, 1950. The adjustment required in depreciation expense and in ground and indirect maintenance expense totals \$31,000 and was determined on the basis of the change in allocation of these expenses to the international operation. Ground operations expense as reported was reduced by \$8,000 on the basis of arrivals and departures. Passenger service expense as reported was reduced by \$15,000 on the basis of the cost per passenger-mile for the year ended June 30, 1950. Selling expenses, including traffic and sales, advertising and publicity, were reduced by \$24,000 from the reported figure for the year ended June 30, 1950 on the basis of the percentage by which non-U. S. mail revenues had been reduced from the reported figures for that year. General and administrative expense was reduced by \$26,000, the adjusted figure estimated at 8.92 percent of total adjustments excluding general and administrative expense.

The total of these expense adjustments attributable directly to the elimination of excessive capacity totalled \$313,000. As shown in Appendix No. 4, pages 2 and 3, the net adjustment to recorded break-even need resulting from the elimination of excessive capacity results in a net decrease in break-down need of \$180,000 after the revenue adjustments of \$133,000 are subtracted from the adjustments to expense.

Direct Maintenance

The only adjustment required in the direct maintenance account is to provide for amortization of the built-in overhaul for the DC-4 aircraft and engines, and the amortization of actual overhaul expenses. C & S does not
 127 have overhaul reserves and has charged overhaul costs to direct maintenance expenses as incurred.

In order to avoid cost fluctuations and in accordance with the built-in overhaul adjustments in the depreciation expense, the carrier's overhaul expenses have been reversed and capitalized and their amortization effected by spreading experienced costs over the overhaul cycle. As a result, direct maintenance expenses have been increased by \$66,000.

Depreciation—Flight Equipment

In the C & S domestic rate opinion of July 1, 1948,¹⁰ the Board recognized and capitalized a high level of DC-4 integration costs with the express condition that for purposes of mail pay determination the carrier's DC-4 depreciation expense be computed on a five-year service life rather than four years which was then considered reasonable for other carriers. C & S has not conformed with this requirement and has been depreciating its DC-4 equipment over less than four-year periods, in some cases at a service life as short as fifteen months. In accordance with our previous domestic opinion, adjustments amounting to \$425,000 are made to reflect a service life of five years and ten percent residual value.

The elimination of the built-in overhaul from the depreciable cost of DC-4 aircraft, in accordance with the Board's previous opinions on this matter, results in a decrease in depreciation expenses amounting to \$85,000 for the hulls and \$30,000 for the engines, raising the total adjustment to depreciation expenses to \$540,000.

Allocation Between Domestic and International Services

In the carrier's domestic mail rate proceeding, the revised allocation of certain common expenses between domestic and international operations, which had been
128 effected by the carrier on January 1, 1948, was applied from the beginning of international operations on November 1, 1946.¹¹ The corresponding adjustments in

¹⁰ Chicago and Southern Air Lines, Inc., Mail Rates, 9 CAB 786, 798 (1948).

¹¹ *Supra*, Note 10.

international operating results for the period from November 1, 1946 to December 31, 1947 are: an increase of \$19,000 in ground and indirect maintenance, an equivalent decrease in advertising and publicity expense and an increase of \$33,000 in general and administrative expense.

DC-4 Integration Costs

Amortization of DC-4 developmental and training costs over a five-year period, which was provided for in the domestic mail rate proceeding, has similarly been recognized. System amortization charges were allocated to international operations in proportion to adjusted depreciation expenses. In view of the sale and retirement of the carrier's DC-4's in the latter half of 1950, amortization was accelerated in the last quarter of 1950 to absorb the remaining balance of integration costs. The amount of \$114,000 claimed by the carrier has been adjusted to eliminate charges prior to the beginning of international operations on November 1, 1946, resulting in a total allowance of \$111,000 for the review period.

Amortization of Preoperating Expense

Preoperating expenses of \$49,000 incurred by the carrier in preparing for certificated operations after the grant of its route certificate have been examined and found reasonable in nature and amount. Accordingly, their complete amortization in the review period has been allowed.

Nonoperating income and expense

Profit on the sale of the carrier's DC-4 aircraft, which were used in international operations during the review period, has been included as other income to reduce breakeven need pursuant to Board policy. The profit
129 has been calculated from the depreciated cost as adjusted to reflect application of the standard five-year life and ten percent residual value for DC-4 equipment, and elimination of "built-in overhaul" from the depreciable cost. The amount of \$19,000 has been allocated as profit to

international operations on the basis of relative depreciation charges to international and domestic operations.

The carrier has claimed \$65,000 for contingent expenses of foreign operations. This has been disallowed in conformance with the Board's established policy that unrealized and purely prospective costs may not be recognized for the purpose of determining mail rates.

Adjusted Break-Even Need

On the basis of the foregoing adjusted total expenses of \$9,001,000 and operating revenues of \$5,879,000, the carrier's break-even need is \$3,122,000 or 67.27 cents per revenue plane mile. This amount is 18.5 percent below the breakeven need of \$3,831,000 claimed by the carrier. After full consideration of the various factors affecting the operations and the break-even need for the period November 1, 1946 to December 15, 1950, we believe that the carrier's revenues and expenses, as herein adjusted, are fair and reasonable for mail pay purposes.

During the past period, 1948-1950, for which the international rate is established herein, the domestic division of C & S was operating under a final mail rate which was made effective January 1, 1948 (*Chicago & Southern Air Lines, Inc., Mail Rates*, 9 C.A.B. 786), and is currently outstanding. Over that period the domestic division earned an average return on investment estimated at 12½ percent. The level of such earnings poses the problem as to

whether any portion of the revenues realized by
 130 C & S under its domestic mail rate can or should
 be offset against the need which would otherwise be found to exist in relation to C & S's international operations, with a resulting reduction in the mail pay to be provided for such operation. We have considered the possible offset of such revenues, but we find that policy considerations to which we advert below render such offset inappropriate.

One primary objective of the Act is to further the development of the airline industry to a point where, in general, it will reach a self-sufficient status. From the mail

rate standpoint this goal is best attainable by placing carriers on permanent rates rather than on cost-plus bases for mail payments. *Transcontinental and Western Air, Inc. v. Civil Aeronautics Board*, 336 U. S. 601 (1949). For it is under permanent rates that there exists maximum incentive on the part of carriers to economical and efficient operation. This conclusion follows because, with the realization that they will retain the advantages of good earnings and yet stand any losses which may eventuate thereunder without reimbursement, carriers will, while on closed final rates, bend every effort to keen, economical, and prudent management.

The responsibility of the Board to place carriers on final future rates as rapidly as possible is an exacting one to discharge even where the carrier operates either
 131 solely in the domestic or solely in the international area. With regard to carriers comprising both domestic and international divisions, the practical problems presented in any attempt to place both divisions on final rates simultaneously are more difficult because many considerations which enter into the fixing of an international rate are different from those entering into the establishment of a domestic rate. As a practical matter, unless a permanent rate under which the carrier will bear the risks of the future can be fixed for domestic operations, where that course is feasible, without the necessity for determining simultaneously the rate for a companion international division, it may often prove to be impossible to fix any permanent rate for the carrier for an extended period of time. Indeed, if we were to determine that such rates must invariably be established simultaneously, it might well turn out to be impossible in some cases to establish future final rates at any time for carriers comprising both domestic and international divisions. Yet, the fixing of forward final rates which stimulate to the maximum the carrier's incentive to low cost operation and high revenue production cannot be foreclosed to the Board if its statutory responsibilities are to be discharged adequately.

132 The public interest in maintaining and furthering the incentive to carriers generated under forward final rates leads us to the conclusion that at this time, without review of any question of power but simply as a matter of policy, we should not offset the profits of the domestic division of C & S earned under the closed rate in establishing the mail rate for the international operation.

We find, therefore, that the principles of the Act will not be best served now by a policy of application of excess earnings under a past rate, as in the case before us, and, accordingly, that the need of the international division of C & S should not be reduced by offset of any portion of the earnings of its domestic division during the three years in issue. In this connection, of course, it should be borne in mind that although the domestic division retains the earnings experienced while on the unconditional permanent rate fixed for that division, we have it in our power, as does the Postmaster General, to institute a proceeding looking toward decrease of the rate for that division when it passes the bounds of reasonableness; and the

133 Board has exercised that power in the past.¹²

Simultaneously with the issuance of this statement, we are causing studies to be made by the staff of the earnings of C & S and of other carriers similarly situated to determine whether proceedings should not be instituted looking toward a decrease in their current final domestic mail rates.

Past Period Investment

Investment claimed by the carrier and recognized for the past period has been set forth in Appendix No. 5, together with adjustments required for rate-making purposes. The

134 average investment claimed by C & S from the beginning of international operations to December 31, 1950 amounts to \$1,270,000. This sum does not vary significantly from the investment as herein adjusted, totaling \$1,360,000.

¹² A recent example is the show cause order in Pioneer Air Lines, Inc., Mail Rates, Docket No. 4000, Order Serial No. E-3010, July 14, 1949, which was finalized on September 15, 1950 by Order Serial No. E-4613.

With respect to working capital, the amount of \$508,000 claimed by the carrier has been reduced by \$35,000. In arriving at working capital investment, C&S neglected to consider all working capital components, namely, the prepayments of \$16,000 and deferred charges of \$2,000 among assets, and deferred credits of \$25,000 and operating reserves of \$6,000 among liabilities. These items when properly included effect a net reduction in working capital of \$13,000. A further reduction of \$22,000 has been made to eliminate excess mail pay from working capital as determined in this order. The resulting recognized working capital of \$473,000 is equivalent to almost three months' adjusted cash operating expenses, a level which indicates a satisfactory financial condition.

The built-in overhaul adjustments and the adjustment of DC-4 depreciation which accrued during the review period result in an average increase in the carrier's investment in flight equipment of \$201,000. This amount comprises: (a) \$183,000 arising from the adjustment of DC-4 depreciation expense to reflect the change in service life from four years and ten percent residual value to five years and ten percent residual value; and (b) \$18,000 conforming to the adjustment of operating expense for built-in overhaul costs.

In accordance with the policy of disallowing investment in equipment purchase funds for rate-making purposes, as set forth in previous cases,¹³ the amount of \$154,000, 135 representing the average amount of advance payments for the purchase of Constellation aircraft, has been removed from investment. During the review period C&S did not use the Constellation aircraft for which these funds were established, and therefore no provision for interest has been made in the past period investment.

Prepayments and deferred charges of a current nature amounting to \$18,000 have been transferred from long-term prepayments to the more appropriate category of working capital as discussed above. Additional amounts of \$25,000

¹³ Braniff Airways Mail Rates, 9 C.A.B. 607, 624 (1948);

Pan Am. Airways, Inc., Transatlantic Mail Rates, 8 C.A.B. 267, 285 (1947).

and \$71,000 have been provided herein to reflect the capitalization of preoperating costs and DC-4 integration costs, respectively, in accordance with the amortization of these items allowed in expenses.

After making the foregoing adjustments the investment recognized herein for the past period amounts to \$1,360,000 (Appendix No. 5).

Mail Rate

The break-even need for the review period, as determined on the basis of the foregoing adjustments, is \$3,122,000. In addition to this amount, the fair and reasonable mail rate must include a fair return on recognized investment. It has been the Board's consistent practice to provide a somewhat lower rate of return for past periods than for future periods in view of the fact that for past periods the probability of error in estimates of operating results is removed and operating risks have been realized. Accordingly, a return of seven percent per annum on the recognized investment of \$1,360,000 will be provided in addition to the break-even need for the review period. This return amounts to

136 \$393,000. The allowance for Federal income taxes of \$130,000 has been computed by removing revenue adjustments and deducting expense disallowances from net taxable income in accordance with the provisions of recent mail rate decisions of the Board.¹⁴

On the foregoing basis, we find that the fair and reasonable rate for the transportation of mail by aircraft over the carrier's international routes for the period November 1, 1946 through December 15, 1950, is \$3,645,000, which is equal to 78.51 cents per revenue plane mile. The mail pay of \$3,645,000 is inclusive of and not in addition to the mail compensation heretofore received by the carrier for mail transported from November 1, 1946 to December 15, 1950, inclusive.

¹⁴ Colonial Air Lines, Inc., Bermuda Mail Rates, Order Serial No. E-5065 of January 24, 1951.

Western Air Lines, Inc. and Inland Air Lines, Inc., Mail Rates, Order Serial No. E-4870 of November 24, 1950.

MAIL RATES FOR THE PERIOD ON AND
AFTER DECEMBER 16, 1950

Scheduled Service Required

The carrier estimated that 1,679,000 revenue plane miles would be flown during a future year. This estimate is based upon a daily round trip between Houston and New Orleans with DC-3 aircraft which amounts to an annual total of 219,000 revenue miles, and the daily operation of Constellation equipment over the New Orleans-Havana-Kingston-Caracas segment totaling 1,460,000 annual revenue miles.

On December 16, 1950 the carrier initiated the operation of Constellation equipment on its international routes, substituting this aircraft on all its former DC-4 schedules. As we pointed out in the section related to the past period, the traffic on the segments south of Havana did not justify the maintenance of daily service over this portion of the route after a reasonable experimental period. This situation is aggravated by the use of the larger and more modern
137 equipment which the carrier indicates is necessary for competitive reasons. While we realize that competition is encountered on the Havana-Caracas segment, there appears to be no compelling reason to warrant the recognition of seven weekly round-trips with Constellation aircraft. In particular, the load factors experienced on this segment in the year 1950 in the operation of seven weekly round-trips with DC-4 aircraft, hardly justify continuing these schedules with Constellation equipment.

We find, therefore, that four round trips per week Havana-Kingston-Caracas with Constellation aircraft is a reasonable volume of service on this segment for a future year. The elimination of 413,000 miles applicable to the three additional round trips per week estimated by the carrier results in 1,047,000 revenue miles to be recognized for the Constellation operation. This mileage, added to the 219,000 miles to be flown with DC-3 aircraft, brings the total revenue plane miles to be recognized for a future year to 1,266,000.

On the basis of the revenue miles recognized above and the standard capacities of 21 seats and 2.4 tons for DC-3 aircraft and 52 seats and 8.0 tons for Constellation equipment, the available seat-miles and available ton-miles to be recognized for the future year are 59,043,000 and 8,902,000, respectively (Appendix No. 6).

In view of the competitive routings which exist for passengers traveling from the United States to Kingston and Caracas, it is reasonable to expect that the reduction which we have made in the carrier's service to and from these points will result in a reduction in the carrier's ability to generate traffic. Consequently, the carrier's estimate of 31,100,000 revenue passenger-miles to be carried in the future year has been adjusted to reflect the indicated decrease in the capacity to be recognized. Since we have reduced

the service to be recognized by 3/7ths between Havana and Caracas a reasonable reduction in the passenger traffic estimate for Kingston and Caracas passengers appears to be a decrease of 2/7ths. This estimate of a 2/7ths reduction is necessarily based on judgment since we are unaware of any exact method by which to determine the decline in passenger traffic resulting from a reduction in capacity to be operated. To the extent that the estimated decline is not directly proportional to the curtailment of capacity, it is our view that this is a reasonable estimate since even the recognized capacity after reduction exceeds what might be termed a minimum pattern of service for the Havana-Caracas segment.

The 2/7th reduction in passenger traffic has been applied to all traffic originated or terminated at Kingston and Caracas except for the local Caracas-Havana traffic which can be carried by C&S only on three schedules per week. Applying the 2/7th reduction to the traffic estimated with the single exception noted, we have recognized a decrease of 5,200,000 revenue passenger-miles from the total estimated by the carrier for a future year. This results in a net to be carried by C&S of 25,900,000 revenue passenger-miles and results in a passenger load factor for the future year

of approximately 44 percent for the entire international route.

Freight ton-miles have been estimated at 533,000 on the basis of the freight revenue forecast for the future year and the freight yield per ton-mile estimated by the carrier.

Excess baggage ton-miles and foreign mail ton-miles have been estimated by dividing the estimated revenue in each category by the yield per ton-mile experienced during the third quarter of 1950, which results in 90,000 excess baggage ton-miles and 3,000 foreign mail ton-miles.

The U. S. mail ton-miles have been forecast at 23,000 for the future year by applying the average load experienced during the third quarter of 1950 to the estimated miles to be flown.

139 *Non-U. S. Mail Revenues*

The carrier estimates \$2,411,000 in passenger revenues for a future year as set forth in Appendix No. 7. An adjustment of this amount is necessary to reflect the reduction in passenger-miles attributable to the reduced volume of service which has been found adequate to meet the needs of the traffic.

Since the Kingston and Caracas traffic produce higher passenger yields than realized elsewhere on the carrier's route, it is necessary that the traffic be eliminated on these segments at a yield higher than the average passenger yield of 6.77 cents forecast by the carrier. A yield of 7.50 cents per passenger-mile, representing the estimated average yield of the passenger traffic to Venezuela, was used in determining the passenger revenue lost due to reduction in Caracas traffic, and 7.00 cents per passenger-mile was used for the loss of Kingston traffic. The passenger revenue forecast by the carrier has thus been reduced by \$385,000 leaving an adjusted amount of \$1,720,000 or 6.64 cents per passenger-mile.

The excess baggage revenue of \$74,000 estimated by the carrier has been adjusted to \$60,000 in order to retain the relationship to passenger revenue indicated in the carrier's forecast.

The freight revenue forecast by the carrier is \$205,000 or 12 cents per revenue mile. Applying this yield per revenue mile to the revenue miles estimated for the future results in \$152,000 of freight revenue for the future year.

Foreign mail revenue for a future year which was estimated at \$8,000 by the carrier has been revised to \$7,000, based upon the level of other revenues. The estimate of \$19,000 in other non-U.S. mail revenues forecast by the carrier has been accepted as reasonable.

140 *Total Non-U.S. Mail Revenue*

The total non-U.S. mail revenues, which were estimated by the carrier to be \$2,411,000, have been reduced by \$453,000 to reflect the adjustments in the various categories discussed above. Therefore, the adjusted estimate of total non-U.S. mail revenues is \$1,958,000.

Operating Expenses

We have used the adjusted expenses for the year ended June 30, 1950 as the base year for estimating future expenses, and have made allowances for increased costs which became effective in 1950 but were not fully reflected in the base year. The bases for future year estimates have been detailed by account in Appendix No. 7.

In forecasting flying operations expense for a future year, we have applied the carrier's estimated cost of 28.29 cents per DC-3 revenue plane mile to its projected DC-3 mileage, and its estimated cost of 69.05 cents per revenue plane mile of Constellation operation to the adjusted mileage for this operation. Likewise, DC-3 direct maintenance expense represents application of the carrier's cost estimates of 10.04 cents per revenue plane mile. Direct maintenance expenses of Constellation aircraft have been estimated at 35.00 cents per plane mile. Depreciation claimed by C & S has been adjusted to reflect adoption of the standard 7-year life and 10 percent residual value for Constellation equipment in place of the 5-year life proposed by the carrier. These adjustments effect a reduction of \$575,000

in the carrier's estimated aircraft operating expenses and result in a recognized total of \$1,473,000 for a future year.

The carrier's forecast of ground and indirect expenses has been found reasonable after downward adjustments of three expense categories. Passenger service expense,

141 taken at the carrier's unit cost of 0.926 cent per revenue passenger mile, has been reduced to agree with the adjusted revenue passenger-miles. Traffic and sales and advertising and publicity expense claimed by the carrier has been reduced to an amount aggregating 20 percent of estimated non-U.S. mail revenues, a ratio approximating that established for comparable carriers in recent rate cases; and on the basis of a similar comparison, general and administrative expense has been reduced to an amount representing 10 percent of other cash expenses. These adjustments, totaling \$266,000, result in adjusted ground and indirect expenses of \$1,821,000.

Total operating expense for a future year has thus been found to be \$3,294,000, equivalent to 260.25 cents per revenue plane mile. This is a high level of expense, but represents the summation of costs which have been individually examined and found reasonable, and is 20 percent below the carrier's estimate. As indicated in the foregoing discussion, the high cost is primarily due to the introduction of Constellation aircraft to enable the carrier to maintain its competitive position and to coordinate with Constellation service on its domestic system. The inherently high unit cost of operating this equipment over the international route, with its relatively low traffic density, has been weighed with regard for these factors. The influence of the general rise in material and labor costs being experienced has also been taken into account. After consideration of the particular circumstances of the carrier's situation, the stated amount of its future year operating expenses has been recognized.

Break-Even Need

The adjusted break-even need for the future year based on non-U.S. mail revenues of \$1,958,000 and total expenses of \$3,294,000 is \$1,336,000, equal to \$1.06 per revenue plane mile.

142 *Investment*

The recognized investment allocated to the international operations for the future period is based on the preliminary balance sheet as of December 31, 1950, which has been adjusted to reflect the elimination of amounts not recognized for rate-making purposes. These adjustments have been summarized in Appendix No. 8.

The total future investment claimed by C & S amounts to \$3,044,000. Of this total \$916,000 represents net working capital based upon the carrier's estimate of three months' cash operating expenses. As of December 31, 1950, however, the carrier's working capital allocated to international operations amounted to \$468,000 after the inclusion of \$104,000 representing 26.30 percent of \$397,000 obtained from the sale of two DC-4 aircraft during the first quarter of 1951. The ratio of 26.30 percent which has been used to allocate working capital between domestic and international operations represents the relationship of estimated cash operating expenses for international operations to the total cash operating expenses of the entire C & S system. From the total working capital of \$468,000 we have deducted \$193,000 which is the international portion of the excess mail pay received by C & S during the review period. The net resulting working capital as herein determined for rate purposes amounts to \$275,000.

Since all Constellation equipment is used by C & S on a system basis, the carrier estimates that one-third of the common investment in six Constellation aircraft should be allocated to international operations. This allocation on the basis of revenue plane miles estimated for the future period appears reasonable and is recognized in the future investment. As indicated in Appendix No. 8, the investment in

Constellation equipment, after restoring the book value of the aircraft to the level of December 16, 1950, is 143 \$2,334,000 or one-third of \$7,000,000, the approximate total cost of six Constellations. To this amount is added \$9,000 representing capitalized interest on the equipment purchase funds relative to these aircraft.

Prepaid and deferred items of a current nature, claimed by the carrier as part of its fixed assets have been eliminated and provided for in working capital. Long term operating property prepayments of \$24,000, the same amount reported in 1950, are found reasonable and are so included in future investment. An additional \$83,000 claimed by the carrier for this category of investment does not appear to be adequately supported and is herein disallowed for rate-making purposes. After all adjustments, the net decrease to claimed investment is \$294,000 resulting in recognized investment of \$2,750,000.

Determination of Mail Rates

In accordance with our findings discussed previously herein, we have determined C & S break-even mail pay requirements to be \$1,336,000 equal to \$1.06 per revenue plane mile as forecast. This determination is \$388,000 or 22.51 percent lower than the break-even of \$1,724,000 estimated by the carrier. The acquisition of the Constellation aircraft has expanded the investment base so that application of a ten percent rate of return, which we have consistently considered fair and reasonable for international operations in a future period, produces a return element of \$275,000 equal to 21.72 cents per revenue plane mile. This compares with an average of 8.36 cents per mile recognized in the past period. Provision for federal income taxes at 47 percent results in the amount of \$244,000 equal to 19.27 cents per revenue plane mile. Total mail pay requirements are, therefore, \$1,855,000 or \$1.47 per revenue plane mile flown in scheduled service.

144 The mail pay requirement of C&S for the future is at a higher rate than any of those currently in

effect for other international carriers. It exceeds the requirement of the other carriers by a substantial margin on any of the customary bases of mail pay comparison, such as plane miles, mail ton-miles or as a percentage of total revenue.

As indicated above, this relatively high level of mail pay, brought about by the operation of Constellation aircraft over a route of very low traffic density, is justified by the circumstances peculiar to C&S operation.

The very fact that the rate established for the future period is substantially higher than that found appropriate for the past period necessarily raises the question whether some adjustment of the route pattern and the volume of services provided south of Havana may not be required. We do not imply by this statement that an adjustment in C&S's route south of Havana is required since, in addition to C&S, operations south of Havana are conducted by other American flag carriers as well as foreign air carriers. However, the high level of mail pay for C&S indicates that it may be appropriate to examine the route structure under which international service south of Havana is being provided by the United States carriers in general, for the purpose of determining whether a realignment of routes in that area might result in reducing the dependency upon the United States Government for mail pay support without a corresponding reduction in the quality of such services. Accordingly, while we do not intimate any definite view as to whether such a realignment may or may not be proper, we have instructed the staff to include the Caribbean area for scrutiny along with the present studies of the domestic route structures. If, upon completion of such studies action with regard to such structure appears warranted, we shall then take such action by formal order and proceeding.

145 C & S has requested a mail rate formula which will provide mail compensation in accordance with our determination on the basis of estimated available seat-miles flown. In view of the carrier's request, we will establish for the period on and after December 16, 1950 a rate which

is calculated to produce the annual amount of mail pay prescribed herein, will be reasonable in terms of the schedule pattern recognized in this opinion, and will change in relation to fluctuations in the volume of service which may be offered.

In order to insure that C & S will receive the amount of mail pay intended by our order, to provide an effective safeguard against overpayment by reason of schedules operated in excess of those found to be required, and finally to distribute mail pay evenly from month to month throughout the year, the recognized available seat-miles over a four-week or twenty-eight day period will be used as a base monthly standard available seat mileage. Accordingly, a base rate of 3.41 cents per standard available seat-mile with a maximum monthly capacity of 4,529,000 standard available seat-miles is found to be the fair and reasonable mail rate for the period on and after December 16, 1950.

CONCLUSION

On the basis of the foregoing considerations, we find that the fair and reasonable rates of compensation to be paid to C & S for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith between the points on its Latin American routes between which the carrier is presently or hereafter may be authorized to transport mail by its certificates of convenience and necessity are as follows:

- 146 A. For the period November 1, 1946—December 15, 1950, inclusive, the sum of \$3,645,000.¹⁵

¹⁵ This amount is equivalent to a rate of 78.51 cents per recognized revenue plane mile flown in scheduled service over the international system. For administrative purposes, the breakdown of mail compensation by periods is as follows:

November 1, 1946—December 31, 1946	152,000
January 1, 1947—June 30, 1947	291,584
July 1, 1947—December 31, 1947	296,416
January 1, 1948—June 30, 1948	358,032
July 1, 1948—December 31, 1948	361,968
January 1, 1949—June 30, 1949	539,032
July 1, 1949—December 31, 1949	547,968
January 1, 1950—June 30, 1950	544,488
July 1, 1950—December 15, 1950	553,512
Total	3,645,000

B. For the period on and after December 16, 1950:

For each calendar month an effective rate per designated mile flown obtained by dividing by the designated miles flown during the month the product of 3.41 cents times the lower of 4,529,000 or the standard available seat-miles flown in scheduled passenger service during the month. For the period from December 16, 1950 to December 31, 1950, the mail rate shall be derived by dividing by the designated miles flown therein the product of 3.41 cents times the lower of 2,264,500 or the standard available seat-miles flown in scheduled passenger service during the period.

The available seat miles flown in scheduled passenger service during the month shall be computed by multiplying the scheduled mileage flown in passenger service during the month with each aircraft type by the standard available seats for that type as specified below:

Aircraft Type	Seats
DC-3	21
DC-4	44
Constellation	52

The aforesaid rates per airplane mile shall be applied to, and the designated mileage flown shall be computed on, the direct airport-to-airport mileage between points served for the carriage of mail on each trip flown on a schedule designated or ordered to be established by the Postmaster General for the carriage of mail, and the scheduled mileage flown shall be computed on the direct airport-to-airport mileage between points actually served on each trip flown in scheduled passenger service, including all trips operated as extra sections thereto.

The compensation provided above should be inclusive of, and not in addition to, the mail compensation received by the carrier for the transportation of mail on and after November 1, 1946 over its Latin American routes.

An appropriate order will be entered.

CHICAGO AND SOUTHERN AIR L

Traffic Statistics a
For the Period Novem

	11-1-
<i>Capacity Operated (000)</i>	6-3
Revenue plane miles	2
Available seat-miles—reported	96
—standard ²	90
Available ton-miles—reported	10
—standard ³	12
<i>Capacity Utilized (000)</i>	
Revenue passenger-miles	33
Revenue ton-miles:	
Passenger (@ 215 lbs.)	3
Freight	
Excess baggage	
Foreign mail	
U. S. mail	
Total	4
<i>Load Factors (Percent)</i>	
Passenger—reported	3
—standard	3
Over-all—reported	3
—standard	3
Average daily route miles in operation	1
Revenue ton miles per route mile per day	
Average daily round trip frequency	
Average daily revenue hours per aircraft	
Performance factor (percent)	9
<i>Revenue per Unit of Service (Cents)</i>	
Passenger revenue per rev. pas.-mile	
Revenue per ton-mile:	
Passenger	7
Freight	3
Excess baggage	6
Foreign mail	20

¹ Scheduled and nonscheduled operations.

² Standard capacities: DC-3, 21 seats; DC-4, 44 seats.

³ Standard available tons: DC-3, 2.4 tons; DC-4, 6 tons.

Appendix No. 1

VES, INC.—INTERNATIONAL OPERATIONS

Reported and as Adjusted
er 1, 1946–December 15, 1950¹

	As Reported		As Adjusted	
	7-1-49 to	11-1-46 to	7-1-49 to	11-1-46 to
	12-15-50	12-15-50	12-15-50	12-15-50
6 to				
49				
72	2,912	4,984	2,571	4,643
16	119,917	216,333	—	—
78	125,356	216,134	110,789	201,567
86	14,958	25,544	—	—
85	17,038	29,423	15,062	27,447
60	40,113	73,973	38,471	72,331
41	4,312	7,953	4,136	7,777
74	804	1,178	774	1,148
02	146	248	141	243
2	8	10	8	10
12	42	54	42	54
91	<u>5,312</u>	<u>9,443</u>	<u>5,101</u>	<u>9,232</u>
12	33.45	34.19		
30	32.00	34.23	34.72	35.88
02	35.51	36.97		
35	31.18	32.07	33.87	33.64
47	2,321	1,627	2,321	1,627
40	4.29	3.85	4.12	3.77
85	1.18	1.02	1.04	.95
8	8.9	7.9	7.8	7.3
91	99.51	98.40	99.55	98.24
55	7.17	7.35	7.17	7.35
23	66.74	68.34	66.67	68.33
96	27.91	30.47	27.91	30.47
51	71.88	67.62	71.88	67.62
00	200.00	200.00	200.00	200.00

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Appendix No. 2

CHICAGO AND SOUTHERN AIR LINES, INC.
INTERNATIONAL OPERATIONS

Comparisons of Traffic Density with Other Carriers

U. S. Flag International Carrier	Revenue Ton-Mile per Route Mile per Day Year Ended	
	Sept. 30, 1949	Sept. 30, 1950
Pan American—LAD	17.4	17.8
AAL—Mexico	14.5	15.2
NAL—Havana	11.4	14.8
Panagra	5.7	6.1
EAL—San Juan	5.7	5.9
Chicago and Southern	4.1	4.1
Colonial	3.3	4.7
Saniff	1.7	2.0

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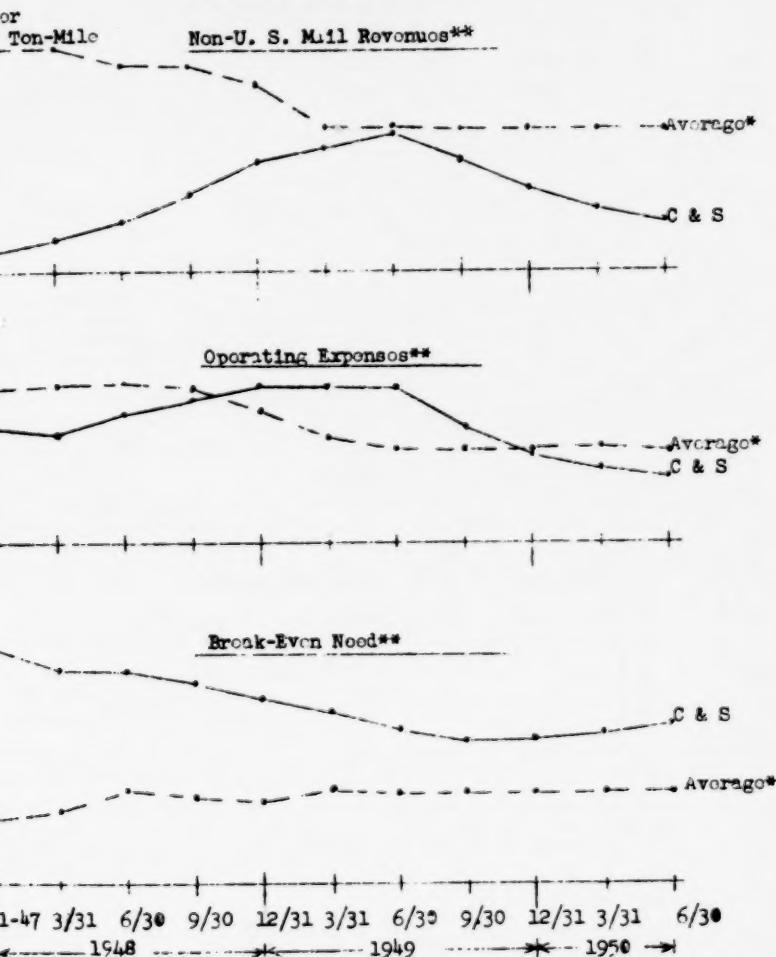
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CHICAGO AND SOUTHERN AIR LINES, INC. - INTERNATIONAL OPERATIONS

150

Comparison of Revenues, Expenses and Break-Even Need
with that of Other U. S. Flag Carriers
per Standard Available Ton-Mile
(12-month moving totals)



Arithmetic average of international operations of American, Braniff, Colonial, Eastern, National, Panagra and Pan American's Latin American Division.

For standard available ton-mile.

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Appendix No. 4

CHICAGO AND SOUTHERN AIR LINES, INC.
INTERNATIONAL OPERATIONS

Financial Results as Claimed and as Adjusted for the Period
November 1, 1946—December 15, 1950
(in thousands)

	Claimed by the Carrier ¹	Adjust- ments	As Adjusted Amount	Cents per Rev. Mile
Plane miles	4,984	-341	4,643	—
<i>S. Mail Revenues</i>				
Passenger	\$5,435	\$-120 D	\$5,315	114.48
Pass baggage	168	-4 D	164	3.53
Express	—	—	—	—
Freight	359	-9 D	350	7.54
Registered mail	20	—	20	.43
For non-U. S. mail	30	—	30	.65
Total Non-U. S. Mail Revenues	\$6,012	\$-133	\$5,879	126.63
<i>Operating Expenses</i>				
Operating operations	\$2,285	\$-155 D	\$2,130	45.88
Direct maintenance—flight equipment	962	12 A D	974	20.98
Depreciation—flight equipment	1,250	-562 B D	688	14.82
Total Aircraft Operating Expenses	\$4,497	\$-705	\$3,792	81.68
<i>Ground operations</i>				
Direct and indirect maintenance	\$1,646	\$ -8 D	\$1,638	35.30
Passenger service	636	9 C D	645	13.88
Engineering	614	-15 D	599	12.90
Advertising and sales	1,081	-43 C D	1,350	29.08
Advertising and publicity	312			
General and administrative	768	7 C D	775	16.69
Depreciation—ground equipment	79	—	79	1.71
Total Ground and Indirect Expenses	\$5,136	\$ -50	\$5,086	109.56
Total Operating Expenses	\$9,633	\$-755	\$8,878	191.24
<i>Income</i>				
Net sale of DC-4 aircraft ²	\$ —	\$ -19 G	\$ -19	-0.41
Amortization of DC-4 integration costs	114	-3 E	111	2.40
Amortization of preoperating expenses	49	—	49	1.06
Operating income and expenses ²	47	-65 F	-18	-0.39
Even Need	\$3,831	\$-709	\$3,122	67.27

Non-U. S. mail revenues and operating expenses as reported on Form
Report for data for period 7-1-50 to 12-15-50 which were submitted by
Carrier as special information. Other data as claimed by carrier.
Plus sign indicates income.

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*Explanatory Notes**A. Direct Maintenance*

- | | |
|---|-----------|
| 1. To eliminate aircraft overhaul expenses | \$-65,908 |
| 2. Allowance for amortization of "built-in" aircraft overhaul | 101,799 |
| 3. Allowance for amortization of "built-in" engine overhaul | 30,129 |

Total

\$ 66,020*B. Depreciation—Flight Equipment*

- Elimination of value of "built-in" overhaul from DC-4 aircraft and engines:

Aircraft	\$-85,195	
Engines	-30,459	\$-115,654

- Adjustment of reported DC-4 flight equipment depreciation expense to reflect changes in service life to 5 years, 10 percent residual value

-424,530

Total

\$-540,184*C. Revision in Allocation Bases*

To reduce reported domestic operating expenses and increase reported international expenses for the period November 1, 1946 to December 31, 1947. (Order No. E-1740 of 7-1-48) The categories of cost allocations which have been revised are:

- | | | |
|------------------------------------|-----------|----------|
| 1. Ground and indirect maintenance | \$ 18,666 | |
| 2. Advertising and publicity | -18,666 | |
| 3. General and administrative | 32,666 | \$32,666 |

D. Elimination of Estimated Revenue and Expenses Applicable to the Excess Capacity

- | | |
|--|-----------|
| 1. Passenger revenue allocated on the basis of passenger-miles and average yield per passenger-mile for the year ended June 30, 1950 | \$120,523 |
| 2. Freight and excess baggage allocated on the basis of relationship to passenger revenue for the year ended June 30, 1950 | 12,800 |

Total revenue adjustments

\$133,323

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- | | |
|--|------------|
| 3. Flying operations expense estimated on basis of cost per revenue plane mile for the year ended June 30, 1950 | \$-155,325 |
| 4. Direct maintenance expense estimated on basis of cost per revenue plane mile for the year ended June 30, 1950 | -54,062 |
| 5. Depreciation expense as adjusted for extension of service life. This adjustment reflects only the change in DC-4 depreciation allocated to international operations | -21,508 |
| 6. Ground operations expenses estimated on basis of arrival and departures | -7,879 |
| 7. Ground and indirect maintenance. This adjustment reflects the change in the allocation between domestic and international operations | -10,149 |
| 8. Passenger service estimated on the basis of cost per passenger mile for the year ended June 30, 1950 | -14,939 |
| 9. Traffic, sales, advertising and publicity. Reasonable estimate based on the level of the other adjustments | -24,000 |
| 10. General and administrative expenses. Estimated at 8.92 percent of total adjustments excluding G & A | -25,677 |

Total expense adjustments

\$-313,539

11. Net adjustment to break-even need		<u><u>\$-180,216</u></u>
E. <i>Integration Costs</i>		
International proportion of amortization of DC-4		
integration costs:		
Claimed by carrier	\$114,655	
Allowed herein	<u>111,332</u>	
Adjustment		<u><u>\$ -3,323</u></u>
F. <i>Nonoperating Income and Expenses</i>		
To eliminate provision for foreign operations contingencies		<u><u>\$-65,000</u></u>
G. <i>Profit on Sale of DC-4 Aircraft</i>		
Profit on sale of DC-4 aircraft allocated to international operations		<u><u>\$-19,000</u></u>

CHICAGO AND SOUTHERN AIR LINES, INC.
INTERNATIONAL OPERATIONS

Average Investment as Claimed and as Adjusted for the Period
November 1, 1946—December 15, 1950
(in thousands)

	As Claimed by C & S	Adjust- ments	As Adjusted
<i>Working Capital</i>			
Current assets	\$829	\$-22 A	\$807
Prepayments	—	16 A	16
Deferred charges	—	2 A	2
Total	\$829	\$- 4	\$825
Current liabilities	\$321	—	\$321
Deferred credits	—	\$ 25 A	25
Operating reserves	—	6 A	6
Total	\$321	\$ 31	\$352
Net working capital	\$508	\$-35 A	\$473
<i>Operating Property and Equipment</i>			
Flight equipment—net	479	201 B	680
Ground property and equipment—net	70	—	70
<i>Other Assets</i>			
Investments and special funds	172	-154 C	18
Prepaid and deferred items	41	-18 D	23
Capitalized preoperating expenses	—	25 E	25
Capitalized DC-4 integration expenses	—	71 F	71
Total Investment	\$1,270	\$ 90	\$1,360

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Explanatory Notes

- A. (1) To include in the computation of average working capital all prepaid and deferred items of a current nature
- | | | |
|---------------------------------|-----------|-----------|
| Prepayment and deferred charges | \$ 17,845 | |
| Deferred credits | -25,118 | |
| Operating reserves | -6,453 | \$-13,726 |
- (2) To eliminate 21.71 percent of average international excess mail pay
- | | |
|-------|-----------|
| | -21,617 |
| Total | \$-35,343 |
- B. (1) To adjust the reserve for depreciation of DC-4 flight equipment to reflect change in service life
- | | |
|--|-----------|
| | \$182,687 |
|--|-----------|
- (2) To decrease reserve for depreciation of DC-4 aircraft and engines to conform to built-in overhaul adjustments of reported depreciation expense
- | | | |
|----------|----------|--------|
| Aircraft | \$37,937 | |
| Engines | 13,210 | 51,147 |

(3) To adjust for the unamortized balance of capitalized aircraft and engine overhaul expense to conform to overhaul expense adjustments of reported direct maintenance expense		-33,010
Total		<u>\$200,824</u>
C. To exclude equipment purchase funds allocated to international operations		<u>\$-153,750</u>
D. To exclude working capital items (prepayments and deferred charges) from long-term operating property prepayments		<u>\$-17,845</u>
E. Average unamortized balance of capitalized preoperating expenses		<u>\$ 24,589</u>
F. Average unamortized balance of capitalized DC-4 integration expenses		<u>\$ 71,229</u>

CHICAGO AND SOUTHERN AIR LINES, INC.
INTERNATIONAL OPERATIONS

Traffic Statistics as Estimated by the Carrier and as
Adjusted by the Staff for a Future Year

<i>Capacity (000)</i>	Carrier's Estimate	As Adjusted Amount	Basis
Revenue plane miles:			
DC-3	219	219	
L-649	1,460	1,047	
	<u>1,679</u>	<u>1,266</u>	A
Available seat-miles—carrier basis	77,593 ¹	0	
Available seat-miles—standard	80,519	59,043	B
Available ton-miles—standard	12,204	8,902	C
<i>Capacity Utilization (000)</i>			
Revenue passenger-miles	31,100	25,900	D
Revenue ton-miles:			
Passenger (@ 215 lbs.)	3,343	2,785	E
Freight	720	533	F
Excess baggage	111 ²	90	G
Foreign mail	4 ²	3	G
U. S. mail	31 ³	23	H
Total	<u>4,209</u>	<u>3,434</u>	
<i>Load Factors (percent)</i>			
Passenger—carrier basis	40.08		
Passenger—standard basis	36.28	43.87	
Over-all—standard basis	34.49	38.58	
<i>Revenue per Unit of Service (cents)</i>			
Passenger revenue per revenue pass.-mile	6.77	6.64	
Revenue per ton-mile:			
Passenger	62.97	61.76	
Freight	28.50	28.50	
Excess baggage	66.37	66.37	
Foreign mail	226.00	226.00	

¹ Based upon DC-3, 21 seats and L-649, 50 seats.

² Carrier's estimated revenue divided by the yield per ton-mile experienced during the third quarter 1950.

³ Experience during third quarter 1950 projected to annual basis.

- A. Based upon seven round trips per week Houston-New Orleans with DC-3; seven weekly round trips New Orleans-Havana and four weekly round trips Havana-Kingston-Caracas with L-649.
- B. Based upon 21 seats per DC-3 aircraft and 52 seats per L-649 aircraft.
- C. Standard capacities DC-3, 2.4 tons; L-649, 8 tons.
- D. Revenue passenger-miles estimated by the carrier have been adjusted by reducing the estimated traffic to and from Caracas and Kingston by 2/7 (28.6%) to reflect the 3/7 reduction (from 7 to 4 weekly flights) in scheduled service to be recognized to these two points.
- E. Estimated revenue passenger-miles multiplied by 215 lbs. converted to ton-miles.
- F. Estimated express revenue divided by the yield per ton-mile estimated by the carrier.
- G. Estimated revenue divided by the yield per ton-mile experienced July-September 1950.
- H. Average load experienced during the third quarter 1950 applied to estimated miles.

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CHICAGO AND SOUTHERN AIR LINES, INC.
INTERNATIONAL OPERATIONS

Financial Results for a Future Year
As Estimated by the Carrier and as Adjusted
(in thousands)

	Carrier's Estimate	Adjust- ments	Adjusted Estimate Amount	Cents per Rev. Mile
Revenue Plane Miles	1,679	-413	1,266	—
<i>Non-U. S. Mail Revenues</i>				
Passenger	\$2,105	\$-385	\$1,720 A	135.90
Excess baggage	74	-14	60 B	4.74
Express	—	—	—	—
Freight	205	-53	152 C	12.01
Foreign mail	8	-1	7 D	0.55
Other non-U. S. mail	19	—	19 E	1.50
Total Non-U. S. Mail Revenues	\$2,411	\$-453	\$1,958	154.70
<i>Operating Expenses</i>				
Flying operations	\$1,070	\$-285	\$ 785 F	62.02
Direct maint.—flight equip.	532	-144	388 G	30.66
Depreciation—flight equip.	446	-146	300 H	23.70
Total Aircraft Operating Exp.	\$2,048	\$-575	\$1,473	116.38
Ground operations	\$ 626	\$ —	\$ 626 E	49.46
Ground and indirect maintenance	268	—	268 E	21.17
Passenger service	288	-48	240 I	18.96
Traffic and sales	472	-192	392 J	30.97
Advertising and publicity	112	—	—	—
General and administrative	296	-26	270 K	21.33
Depreciation—ground equipment	25	—	25 E	1.98
Total Ground and Indirect Exp.	\$2,087	\$-266	\$1,821	143.87
Total Operating Expenses	\$4,135	\$-841	\$3,294	260.25
<i>Break-Even Need</i>	\$1,724	\$-388	\$1,336	105.55

Explanatory Notes

- Estimated revenue passenger-miles times 6.64 cents, estimated average yield per passenger-mile.
- Relationship of excess baggage revenue to passenger revenue estimated by carrier.
- Estimated revenue ton-miles times 28.50 cents, estimated average yield per freight ton-mile.
- Reasonable estimate based on level of other revenue items.
- As estimated by Chicago and Southern.
- Cost per revenue plane mile estimated by the carrier.
1. DC-3 based on cost per revenue plane mile estimated by Chicago and Southern.
2. L-649 cost per revenue plane mile estimated at 35.00 cents per mile.
- Annual depreciation of two L-649 aircraft.
- Cost per passenger-mile estimated by Chicago and Southern.
- Estimated at 20 percent of non-U. S. mail revenues.
- Estimated at 10 percent of other cash expenses.

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Appendix No. 8

CHICAGO AND SOUTHERN AIR LINES, INC.
INTERNATIONAL OPERATIONSFuture Period Investment
(in thousands)

	As Claimed by C & S	Adjust- ments	As Adjusted
<i>Net Working Capital</i>	\$ 916	\$-641 A	\$ 275
<i>Operating Property and Equipment</i>			
Flight equipment—net	1,887	456 B	2,343
Ground property and equipment—net	74	—	74
<i>Other Assets</i>			
Investments and special funds	34	—	34
Prepaid and deferred items	26	-26 C	—
Long-term operating property prepayments	107	-83 D	24
Total Investment	<u>\$3,044</u>	<u>\$-294</u>	<u>\$2,750</u>

Explanatory Notes

A. (1) To reverse carrier's claimed working capital estimate	\$-916,000
(2) To provide for net working capital based upon 26.30 percent of preliminary balance sheet data as of December 31, 1950:	
Current assets	\$928,407
Prepayments	26,752
Deferred charges	4,330
Total	<u>\$959,489</u>
Current liabilities	\$584,140
Operating reserves	11,835
Total	<u>\$595,975</u>
Net working capital	363,514
(3) To reduce working capital by 26.30 percent of excess mail pay	-192,779
(4) To increase working capital to include receipts from sale of two DC-4 aircraft during the first quarter of 1951 (26.30% of \$397,000)	104,411
Total	<u>\$-640,854</u>
B. (1) To add first year accrued depreciation to restore book value of aircraft to the level at the beginning of L-649 operations	\$446,667
(2) To provide for the capitalization of interest on equipment purchase funds at the rate of five percent per annum for a period of six months, with one-third of the total allocated to international operations	9,375
Total	<u>\$456,042</u>
C. To exclude working capital items from "Other Assets"	<u>\$-26,321</u>
D. To eliminate unsupported long-term operating property prepayments	<u>\$-83,031</u>

Orders
Serial Number E-5385

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in
Washington, D. C. on the 18th day of May, 1951.

Docket No. 2564

In the matter of the compensation for the transportation
of mail by aircraft, the facilities used and useful there-
for, and the services connected therewith, of

CHICAGO AND SOUTHERN AIR LINES, INC.

over its Latin American Route.

Order to Show Cause

The Board having considered all of the information and data set forth, or specifically referred to, in the Statement of Tentative Findings and Conclusions, together with the Appendixes attached thereto, dated May 18, 1951, (hereinafter referred to as the "Statement"), which Statement is attached hereto and made a part hereof, and having on the basis thereof made the tentative findings and conclusions set forth in the Statement;

IT IS ORDERED, That Chicago and Southern Air Lines, Inc. is directed to show cause why the Board should not make final the findings and conclusions set forth in the Statement, and upon the basis thereof fix, determine and publish the rates set forth in said Statement as the fair and reasonable rates of compensation to be paid the carrier for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith over its Latin American routes on and after November 1, 1946;

IT IS FURTHER ORDERED, That all further procedure herein shall be in accordance with Section 302.13 of the Procedural Regulations and that any notice, as provided for in para-

graph (c)(1) of said Section 302.13, that there exists any objection to the rates set forth in the Statement or to the admissibility in evidence of any exhibits accompanying, or to the information specifically referred to in, the Statement shall be filed with the Civil Aeronautics Board within ten days after the date of service of this Order, and if notice is filed as aforesaid, written answer and any supporting documents, as provided for in paragraphs (c)(1) and (c)(2) of said Section 302.13, shall be filed with the Board within thirty days after the date of service of this Order;

IT IS FURTHER ORDERED, That if answer is filed hereto all elements entering into the determination of fair and reasonable rates, except insofar as limited in prehearing conference, shall be in issue, and in such event the final rates shall be determined upon the record made with respect to such issues;

IT IS FURTHER ORDERED, That this order and the attached Statement of Tentative Findings and Conclusions be served upon Chicago and Southern Air Lines, Inc.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN

M. C. Mulligan
Secretary

(SEAL)

• • • • •

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket No. 2564

CHICAGO AND SOUTHERN AIR LINES, INC.
LATIN AMERICAN OPERATIONS

In the matter of the compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith.

Decided: October 18, 1951

For policy reasons the Board will not offset the excess earnings realized from Chicago and Southern's domestic operations under a final mail rate against the carrier's "need" for mail pay resulting from operations over its Latin American route.

Provision for Federal income taxes should be based on the actual Federal income tax rate rather than the 38 percent tax rate in force prior to the current national defense emergency.

APPEARANCES:

R. S. Maurer, L. E. Black, and W. C. Stone for Chicago and Southern Air Lines, Inc.

Roy C. Frank and Eugene J. Brahm for the Post Office Department.

Arnold D. Berkeley and Allen C. Lande, Bureau Counsel.

Opinion

BY THE BOARD:

This proceeding involves the determination of final mail rates for the Latin American operations of Chicago and Southern Air Lines, Inc., hereinafter called C&S. In re-

sponse to the petition of the carrier filed on October 11, 1946, we issued a Statement of Tentative Findings and Conclusions on May 18, 1951 (Order Serial No. E-5385), proposing final mail rates for the international operations of C&S for the past period November 1, 1946-December 15, 1950, inclusive, and for the future period beginning December 16, 1950.

C&S has accepted the proposed rates, but the Postmaster General has filed objections and an Answer to the Statement of Tentative Findings and Conclusions. In accordance with the Procedural Regulations the issues raised by the objections have been defined and hearing has been held. The parties have submitted briefs to the Board, and have agreed to waive further procedural steps prior to final decision.

The parties have stipulated that no facts are in controversy and have submitted only two issues involving questions of policy and law for our decision. As expressly limited by agreement of the parties, the two issues are as follows:

1. Whether in fixing mail rates for past and future rate periods involving operations of C&S over its Latin American route, the Board should offset the excess earnings realized by the carrier's domestic routes while operating under a final mail rate.
2. Whether the Board should recognize and apply the actual Federal income tax rate, rather than a 38 percent tax rate, for the purpose of computing the tax allowance in the rates to be established for the Latin American division of C&S.

Since, except as stated above, our findings and conclusions in the Tentative Statement have not been contested as to matters entering into the determination of mail rates for this carrier, resolution of these issues is all that remains necessary for the determination of the fair and reasonable final mail rates.

248 *The Offset of Earnings of the Domestic Routes
Against The "Need" of the Latin American Routes*

During part of the past period involved in this proceeding, namely, 1948-1950, the domestic routes of C&S were operated under final mail rates which yielded the carrier an average rate of return on investment estimated at 12.5 percent. When fixing these mail rates, the Board had estimated a rate of return of 7.4 percent for the carrier from its domestic operations. In undertaking the issuance of a Statement of Tentative Findings and Conclusions for mail rates for C&S' international routes in this case we gave careful consideration to the possible offset of such excess earnings against the "need" resulting from the carrier's international operations. We decided, however, for reasons of economic policy, that no offset should be made.¹ The Postmaster General has objected to this finding, arguing that the "all other revenue" language of section 406(b) of the Act requires that the Board offset the excess earnings from domestic operations under the final rate against the "need" resulting from international operations in establishing rates applicable to both the past and future operations of the international routes. The carrier and the Bureau Counsel maintain that there is no duty of offset, and urge that none be made. In fact, Bureau Counsel questions the Board's power to offset earnings of one segment of an air carrier's operations under an unchallenged final mail rate against the "need" incurred on a different part.

249 After careful consideration of the various contentions of the parties, we conclude that we are not required to make the offset urged by the Postmaster General. Subsequent to the issuance of our Tentative Statement in this proceeding we had occasion in the *Western Air Lines, Inc.-Inland Air Lines, Inc., Mail Rates Case*,² to express an

¹ At the same time we pointed out that we had the power to institute proceedings to reduce rates and that we were having the staff make studies of C&S' earnings to determine whether such proceedings should be instituted. As a result of these studies, we issued an order on October 1, 1951 (Order Serial No. E-5747), reopening the current final mail rates for the domestic operations of C&S and six other domestic trunkline operators.

² Order Serial No. E-5467, adopted June 26, 1951.

opinion on the obligation imposed on us by the Act to consider "other revenue" for the purpose of reducing need in final mail rate proceedings. We there concluded that while we are required to take into consideration the need of a carrier for mail compensation together with "all other revenue", we believe that we are not required by section 406(b) to reduce the carrier's mail pay with any part of such other revenue if there are sound reasons for not doing so as a matter of economic policy. Reappraising that opinion in the light of this case, we consider that the same principle is applicable here in view of the policy considerations which we discuss below.

If an offset policy were adopted, the almost invariable result would be that, as in the instant case, the profits from a carrier's domestic operation would be used to sustain any international operations it might have. Recognizing this likelihood, we hesitate to burden the more robust segment of the industry with the obligations of the economically weaker part. For if the domestic air transport system can be kept financially sound, the public must ultimately benefit, putting aside any consideration of the obvious advantage of reduced rates of mail compensation. Thus, we anticipate that if the carriers' earning position continues strong, reductions in the domestic fare level will be possible, thereby giving impetus to the further development of the
 250 industry. In addition, with improved earnings, the domestic operators should be able to benefit the public and themselves with more modern aircraft, and with improved methods affording safer and more efficient operations. We cannot escape the thought that if we allow international operations to be carried on the back of domestic operations, we shall be subjecting the latter to an unjustifiable strain. Many of the domestic operators are well along the road to self-sufficiency. It is our duty to speed them on their way, not thwart them.

It also appears desirable to maintain the comparative status between those domestic operators which have foreign routes as against those which do not have foreign routes.

Since carriers fall into fairly well-defined classes, the Board is enabled to fix uniform domestic mail rates for groups of carriers provided, of course, that their comparative status is preserved by excluding consideration of any international operations. A carrier operating under a class rate has every incentive to operate efficiently because it may retain any profits it earns in excess of the estimated return to be afforded by the uniform rate. It is also administratively desirable to preserve a comparative status between carriers because the Board has been able to analyze the operations of each carrier within a class in the light of the results achieved by others within the same class. The comparison technique of rate-making has proved to be the most satisfactory and practicable available to the Board. If we were required to fix rates for both domestic and international operations at the same time, it would be difficult, if not impossible, to find a suitable basis for a comparison technique of analysis.

251 In view of the foregoing, we find that the earnings from C&S' domestic routes should not be used to offset the "need" resulting from the carrier's international routes. This conclusion stems from considerations of economic policy; we are not deciding the question of our legal power to make such an offset.

The Allowance for Federal Income Taxes

The Postmaster General objects that it is not proper to recognize in the mail rate to be paid by the Government any actual corporate tax rate increase in excess of 38 percent because such an allowance would defeat the basic purposes of the tax increases, namely, to raise the public funds necessary to meet the national defense emergency and to safeguard against further inflationary tendencies. He adds that the carrier, like other citizens, should bear its share of the increased tax burden.

Although the parties have agreed that the tax return technique which we adopted in the *Western-Inland Mail Rates Case* should be employed in this proceeding, the

Postmaster General, who strongly favored such a technique, now wishes to depart from it to the extent that he proposes to recognize only a 38 percent tax rate instead of the higher actual rate of 42 percent during 1950 and 47 percent thereafter. Bureau Counsel and the carrier oppose this contention. Under the Postmaster General's theory a tax allowance would be derived which falls short of meeting the carrier's actual tax liability as reflected on the face of the return. In view of the nature of the tax return technique of making provision for taxes, we cannot accept the Postmaster General's argument.

It is well established that in fixing the rate to be allowed a public utility for a proper income, the Federal income tax must be provided for as an operating charge. 252 The courts have followed this principle and the Board itself has followed it in all of its mail rate decisions. During the period when Federal income tax rates on corporations were gradually raised from 19 percent in 1938 to the 38 percent level prior to 1950, the Board and other regulatory agencies recognized these increases as proper operating charges in determining what rates would constitute a fair return on investment.³

As we indicated in the *Western-Inland Mail Rates Case* the purpose of the tax allowance is to afford the carrier an opportunity to realize the full rate of return which the Board has determined it should properly be granted to meet its statutory needs. Thus, we have determined in this case that the carrier is entitled to a rate of return of 7 percent for the past period and 10 percent for the future period. The Postmaster General has not demonstrated that the rates of return prescribed for C&S and carriers of its class are excessive or unreasonable under current conditions. Yet, if the carrier is taxed at the 47 percent rate, but the allowance for taxes is based on a hypothetical 38 percent rate, as the Postmaster General suggests, C&S will have after taxes a rate of return on investment of

³ Of course, our discussion of the proper Federal income tax allowance does not cover the question of excess profits taxes since they are not in issue here.

only 5.9 percent for past periods and 8.5 percent for future periods rather than the returns which the Board has found to be reasonable.

Finally, another basic flaw in the Postmaster General's argument is that he assumes an increase in corporate taxes will automatically reduce the net income of unregulated enterprises, and, therefore, that it would be unjust to permit air carriers an exemption from this general reduction in corporate net income after taxes. However, there is nothing in the recently enacted price control or tax legislation which indicates a congressional intention to reduce the profits earned either by ordinary corporations or public utilities to a level which falls below a fair and reasonable return.

CONCLUSION

In view of the foregoing, we find that the objections of the Postmaster General to the Statement of Tentative Findings and Conclusions (Order Serial No. E-5385) issued in this proceeding should be denied. However, an adjustment must be made in the rate of mail compensation for the past period. This arises from the fact that the parties have stipulated that the allowance for Federal income taxes of \$130,000 made in the Tentative Statement should be increased to \$147,000. This change results from the application of the tax return technique of determining the proper allowance for Federal income taxes instead of the "hybrid" method which was used by the Board in the Tentative Statement but which has been abandoned since that time.⁴ Accordingly, we reaffirm and hereby adopt our findings in the Statement of Tentative Findings and Conclusions, except with respect to the allowance for Federal income taxes in the past rate period and the issue of offset discussed above.

Therefore, we now find that compensation for the transportation of mail over its international routes

⁴ Adoption of the tax return technique was first announced by the Board in *Western Air Lines, Inc.-Inland Air Lines, Inc., Mail Rates*, Order Serial No. E-5467, adopted June 26, 1951.

by C&S for the period November 1, 1946-December 15, 1950, inclusive, should be fixed at \$3,662,000.

An appropriate order will be entered.

Nyrop, Chairman, Ryan, Lee, Adams, and Gurney, Members of the Board, concurred in the above opinion.

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Orders

Serial Number E-5793

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 18th day of October, 1951.

Docket No. 2564

In the matter of the compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, of

CHICAGO AND SOUTHERN AIR LINES, INC.

over its Latin American Route.

Order Fixing and Determining the Fair and Reasonable Final Rates of Compensation for the Transportation of Mail by Aircraft

A public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision, which is attached hereto and made a part hereof;

IT IS ORDERED, That the fair and reasonable rates of compensation to be paid to Chicago and Southern Air Lines, Inc., for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith between the points on its Latin American routes between which the carrier is presently or hereafter may be authorized to transport mail by its certificates of convenience and necessity are as follows:

1. For the period November 1, 1946-December 15, 1950, inclusive, the sum of \$3,662,000.¹
2. For the period on and after December 16, 1950:

For each calendar month an effective rate per designated mile flown obtained by dividing by the designated miles flown during the month the product of 3.41 cents times the lower of 4,529,000 or the standard available seat-miles flown in scheduled passenger service during the month. For the period from December 16, 1950, to December 31, 1950, the mail rate shall be derived by dividing by the designated miles flown therein the product of 3.41 cents times the lower of 2,264,500 or the standard available seat-miles flown in scheduled passenger service during the period.

256 The available seat miles flown in scheduled passenger service during the month shall be computed by multiplying the scheduled mileage flown in passenger service during the month with each aircraft type by the standard available seats for that type as specified below:

Aircraft Type	Seats
DC-3	21
DC-4	44
Constellation	52

The aforesaid rates per airplane mile shall be applied to, and the designated mileage flown shall be computed on, the direct airport-to-airport mileage between points served for the carriage of mail on each trip flown on a schedule designated or ordered to be established by the Postmaster General for the carriage of mail, and the scheduled mileage flown shall be computed on the direct airport-to-airport mileage between points actually served on each trip flown in scheduled passenger service, including all trips operated as extra sections thereto.

The compensation provided above shall be inclusive of, and not in addition to, the mail compensation received by the carrier for the transportation of mail on and after November 1, 1946, over its Latin American route.

¹ This amount is equivalent to a rate of 78.87 cents per recognized revenue/plane mile flown in scheduled service over the international system.

IT IS FURTHER ORDERED, That the aforesaid order fixing fair and reasonable rates shall be effective as of this date, all parties to the above-entitled proceeding having already waived all procedural requirements subsequent to hearing short of a final decision of the Board fixing rates herein.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN
M. C. MULLIGAN
Secretary

(Seal)

258

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket No. 2564

In the matter of the compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, of

CHICAGO AND SOUTHERN AIR LINES, INC.
over its Latin American Route.

Petition to Reconsider

TO THE CIVIL AERONAUTICS BOARD:

The Postmaster General, pursuant to Section 302.11 of the Board's Rules of Practice, hereby petitions the Board to reconsider the ruling for mail rate-making purposes which fails to take into account the excess earnings realized by the carrier from its domestic operations when fixing and determining the true subsidy need of the carrier, Chicago and Southern, during the same period of time involved for the Latin American operation of C. & S. The ruling is set forth in the Board's Opinion and Order E-5793, of October 18, 1951, in the above-entitled rate proceeding. The said ruling is challenged herein on the grounds that:

I

The mail rate section (406(b)) of the Civil Aeronautics Act requires the Board to apply the excess earnings of the domestic system—as “other revenue”—when determining the true need of the carrier as a whole for subsidy mail compensation.

II

The Board has failed to consider the Postmaster General's contention that C. & S. has no “need” for additional compensation for its Latin American operations to the extent that C. & S. has received excess earnings from its domestic operations which meets the need requirements of the Latin American operations for the same period of time.

259

III

Excess subsidy should never be deemed to be needed in order to maintain an air transport system on a sound financial basis.

IV

The Board's reason—to enable the Board to provide a uniform class mail rate for groups of carriers—used as a foundation for the rule in question is not supported by actual facts and practices.

• • • • •

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C. on
the 18th day of January, 1952.

Docket No. 2564

In the matter of the compensation for the transportation
of mail by aircraft, the facilities used and useful there-
for, and the services connected therewith, of

CHICAGO AND SOUTHERN AIR LINES, INC.
over its Latin American Route.

Order Denying Petition for Reconsideration

The Board having issued on October 18, 1951, an opinion and order¹ fixing final mail rates for both past and future periods for the Latin American operations of Chicago and Southern Air Lines, Inc.;

The Postmaster General of the United States having filed on November 19, 1951, a petition for reconsideration of this opinion and order only insofar as the Board decided not to offset the excess earnings realized by the carrier's domestic operations against the "need" on its Latin American operations, and the carrier and Bureau Counsel having filed their respective answers to the petition for reconsideration in support of the Board's decision;

The Board, upon consideration of the petition of the Postmaster General, finding that it contains no matter not previously considered by the Board herein, and that the matters set forth therein do not warrant the granting of the relief requested;

¹ Order Serial No. E-5793.

IT IS ORDERED, That the petition for reconsideration of the Postmaster General be, and it hereby is, denied.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN
M. C. Mulligan
Secretary

(SEAL)

183-A

BEFORE THE
CIVIL AERONAUTICS BOARD

Docket No. 2564

In the matter of the compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, of

CHICAGO AND SOUTHERN AIR LINES, INC.

over its Latin American Route.

[Excerpts From] Stipulation and Waiver Respecting Answer of the Postmaster General

WHEREAS the Board has heretofore issued in the above-entitled proceeding an Order directing the parties to show cause why the Board should not adopt the proposed rates set forth in the Statement of Tentative Findings and Conclusions, accompanying the said Order Serial Number E-5385, adopted May 18, 1951, in Docket No. 2564;

AND WHEREAS the Post Office Department having filed a notice of objections to said Order, and its accompanying Statement of Tentative Findings and Conclusions, and an Answer, dated June 14, 1951 filed pursuant to Section 302.13(c) of the Procedural Regulations of the Board, which said Answer objected to the Board's method of computing Federal income taxes for the past and future rate-making periods involved, and also to the Board's refusal to take into account the excess earnings of the domestic division when considering the needs of Chicago and Southern's international division;

183-B AND WHEREAS all of the parties desire to expedite the final disposition of this rate proceeding they have decided to waive certain procedural steps and enter into a stipulation concerning the factual issues raised by the said Answer, leaving the legal and policy issues thereby presented for determination by the Board;

NOW THEREFORE this stipulation entered into this 31st day of July, 1951, between the parties in the above-entitled proceeding witnesses that Chicago and Southern Air Lines, Inc., the Post Office Department and Bureau Counsel, do agree and consent, as follows:

• • • • •

183-C (5) That the total earnings, in excess of whatever rate of return on recognized investment shall be adopted as a standard for this purpose by the Board, realized by the domestic division of Chicago and Southern Air Lines, Inc. during the past period commencing January 1, 1948, and extending through December 15, 1950 were as shown in the computations made by the staff, which are attached hereto as Appendix II, and that such computations be made a part of this Stipulation;

• • • • •

183-I

Appendix II

CHICAGO AND SOUTHERN AIR LINES, INC.

Computation of Earnings from Domestic Operations to be Offset in
the Mail Rate for the International Division
Years 1948-1950
(in thousands)

	1948	1949	1950	Total
Domestic Operating Net Profit:				
As reported	\$ 446	\$ 471	\$ 470	\$1,387
Adjustments (see page 2)	69	115	31	215
Total	<u>\$ 515</u>	<u>\$ 586</u>	<u>\$ 501</u>	<u>\$1,602</u>
Investment	\$4,150	\$4,035	\$4,617	\$4,267
Rate of Return	12.41%	14.52%	10.85%	12.51%
Earnings Above:				
8 percent	\$ 183	\$ 263	\$ 132	\$ 578
10 percent	100	182	39	321

183-J

CHICAGO AND SOUTHERN AIR LINES, INC.

Computation of Net Profit Adjustments
Years 1948-1950
(in thousands)

	1948	1949	1950	Total
<i>Expense Additions</i>				
Adjustment of DC-3 depreciation to reflect change in service life	\$125	\$ 63	\$ —	\$188
DC-4 equipment integration costs	36	26	37	99
Accounting change in allocation of joint expenses due to excess capacity disallowance in international operations:				
Depreciation	—	—	21	21
Ground Operations	—	—	8	8
Ground and indirect maintenance	—	—	10	10
General and administrative exp.	—	—	23	23
Total	<u>\$161</u>	<u>\$ 89</u>	<u>\$ 99</u>	<u>\$349</u>
<i>Expense Deductions</i>				
Adjustment of DC-4 depreciation to reflect changes in service life	\$148	\$204	\$103	\$455
Profit on sale of DC-4 aircraft allocated to domestic system	—	—	27	27
DC-3 depreciation charged by carrier ¹	82	—	—	82
Total	<u>\$230</u>	<u>\$204</u>	<u>\$130</u>	<u>\$564</u>
Total Adjustment to Reported Net Profit	<u>\$ 69</u>	<u>\$115</u>	<u>\$ 31</u>	<u>\$215</u>

¹ After domestic rate order of July 1, 1948 C&S changed service life of DC-3 aircraft from common retirement date of 6-30-47 to 12-31-48.

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[fol. 67] [File endorsement omitted]

No. 11,351

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT, APRIL TERM, 1952

JESSE M. DONALDSON, Postmaster General of the United
States, and the United States of America, on behalf of the
Postmaster General, Petitioners,

v.

CIVIL AERONAUTICS BOARD, Respondent

Before Stephens, Chief Judge, and Proctor and Fahy,
Circuit Judges, in Chambers

ORDER—Filed April 21, 1952

Upon consideration of the motion of Chicago & Southern
Air Lines, Inc., a corporation, for leave to intervene as a
party respondent in the above-entitled case and it appear-
ing that no objections have been filed thereto, it is

Ordered by the Court that Chicago & Southern Air Lines,
Inc., be, and it is hereby, allowed to intervene in the above-
entitled case.

Per Curiam.

Dated: April 21, 1952.

[fol. 68] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, JANUARY TERM, 1953

[Title omitted]

Before Edgerton, Acting Chief Judge, in Chambers

ORDER—Filed February 25, 1953

Upon consideration of the motion of petitioners herein
for leave to substitute Arthur E. Summerfield, Postmaster
General of the United States as a party to this action on

the ground that Jesse M. Donaldson has resigned from the office of Postmaster General of the United States and that Arthur E. Summerfield, is now lawfully acting as Postmaster General of the United States, and it having been alleged that there is substantial need for continuing and maintaining this action, and it appearing that the respondent has not filed objections thereto, it is

Ordered that the motion be granted and that Arthur E. Summerfield, Postmaster General of the United States, be, and he is hereby, substituted in the place and stead of Jesse M. Donaldson as petitioner.

Dated: February 25, 1953.

[Vol. 69] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

No. 11,351

ARTHUR E. SUMMERFIELD, Postmaster General of the United States, and The United States of America, on behalf of the Postmaster General, Petitioners,

v.

CIVIL AERONAUTICS BOARD, Respondent,
CHICAGO AND SOUTHERN AIR LINES, INC., a Corp., Intervenor
On Petition for Review of Order of the Civil Aeronautics Board

Decided May 4, 1953

Mr. Daniel M. Friedman, Special Assistant to the Attorney General, Department of Justice, *pro hac vice*, by special leave of Court, with whom Mr. Newell A. Clapp, Acting Assistant Attorney General, Department of Justice, was on the brief, for petitioners. Messrs. Charles H. Weston, Chief, Appellate Section of the Antitrust Division, Department of Justice, and William E. Kirk, Jr., Assistant United States Attorney at the time of argument, also entered

appearances in behalf of the petitioners. Mr. H. Graham Morison, Assistant Attorney General at the time the record was filed, also entered an appearance in behalf of the petitioners.

[fol. 70] Mr. O. D. Ozment, Attorney, Civil Aeronautics Board, with whom Mr. John H. Wanner, Acting General Counsel, Civil Aeronautics Board, was on the brief, for respondent. Mr. Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board, also entered an appearance in behalf of the respondent.

Mr. William A. Roberts, with whom Messrs. Harold A. Kertz, James E. Wilson and Mrs. Irene Kennedy were on the brief, for the intervenor, Chicago and Southern Air Lines, Inc.

Before Prettyman, Proctor and Bazelon, Circuit Judges

OPINION—Filed May 4, 1953

PROCTOR, Circuit Judge:

This case is before us to review an order of the Civil Aeronautics Board fixing mail pay rates for Chicago and Southern Air Lines' Latin American routes.¹

¹ The pertinent parts of the Civil Aeronautics Act of 1938, §§ 406(a) and (b), 52 Stat. 998, Reorg. Pl. No. IV of 1940, 54 Stat. 1235 (1940), 49 U. S. C. § 486 (1946 ed.), provide as follows:

"Sec. 406. (a) The Board is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft . . . and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

"(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air car-

[fol. 71] In July, 1948, the Board fixed final rates for the carrier's domestic routes. These included a prospective rate commencing January 1, 1948, estimated to yield a net return, after taxes, of 7.4% on the carrier's investment allocable to domestic operations. Actually the average yield for the years 1948 through 1950 was 12.51%, or \$654,000 more than estimated.

Later, October 18, 1951, the Board ordered final mail rates for the carrier's Latin American routes, retroactively from November 1, 1946 to December 15, 1950, and prospectively from December 16, 1950. These rates were estimated to yield a net return of 7% for the past period and 10% for the future. In determining the same the Board refused, for what it termed "sound reasons . . . of economic policy," (J. A. 54), to offset the carrier's excess profits of \$654,000 from its domestic routes against "need" or subsidy requirements for the international operations (J. A. 53). The refusal to make the offset forms the basis of this appeal.

Although the brief filed in behalf of the Board carries an intimation (p. 12) that refusal to offset the carrier's excess domestic profits may be supported under §406(b) [fol. 72] permitting "different rates for . . . different classes

riers or classes of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation [*sic*] of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

of service," findings and conclusions of the Board reveal no such reason. Their action is explained in these words:

"The public interest in maintaining and furthering the incentive to carriers generated under forward final rates leads us to the conclusion that at this time, *without review of any question of power* but simply as a matter of policy, we should not offset the profits of the domestic division of C & S earned under the closed rate in establishing the mail rate for the international operation." [Emphasis added.] (J. A. 21. See also J. A. 53.)

Thus it appears that the Board was initiating a new "incentive" policy without consideration of its authority under the Act to adopt a plan which omitted an offset of the excess profits arising from domestic operations.

The Postmaster General does not question the Board's authority to fix rates separately for different operating divisions of the carrier, but he does insist that the end result of fixing rates for a carrier must not go beyond that point where the total subsidy exceeds the need of the carrier as a whole. We agree with this contention.

In our opinion failure of the Board to make the offset is at variance with the plain meaning of §406(b). That section speaks in terms of a carrier as a single entity; not as divisible units conducting separate operations. This meaning is clearly reflected in the requirement that "In determining the rate [of mail pay] in each case, the Board *shall* take into consideration . . . the need of each such air carrier for compensation . . . to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier"² to meet the declared objectives of the Act. Accordingly, in determining the "need" requirements of Chicago and Southern Air Lines for its Latin American routes the Board must consider "all [fol. 73] other revenue of the air carrier." Admittedly the excess profit of \$654,000 derived from domestic operations is part of that revenue, so refusal of the Board to "take" the item "into consideration" in determining a rate for the

² Emphasis added.

Latin American routes results in allowing the carrier \$654,000 more than its actual need, in disregard of the statutory requirement to keep subsidy allowances within those bounds.

Heretofore the Board has treated an air carrier as "the primary unit around which the national air transportation system was to be developed through the instrumentality of air mail compensation," and the "need" as "that of the air carrier as a whole and not that of any particular geographical division of its operations." *Chicago and Sou. A. L. Mail Rates—Route Nos. 8 and 53*, 3 C. A. B. 161, 190 (1941). This principle was reaffirmed in *Pan Am. Airways, Inc., Alaska Mail Rates*, 6 C. A. B. 61, 67 (1944), wherein the Board denied subsidy mail pay on the Airways' Alaska division because excess earnings from its more profitable divisions greatly exceeded the Alaska division's requirements. Thus we have an established construction of the Act by the Board which should be given weight. *Power Comm'n v. Panhandle Co.*, 337 U. S. 498, 513, 93 L. Ed. 1499, 1509 (1949); *United States v. Amer. Trucking Ass'ns.*, 310 U. S. 534, 549, 84 L. Ed. 1345, 1354 (1940).

We agree with those pronouncements of the Board. We think they correctly indicate the duty of the Board in fixing "fair and reasonable rates of compensation" under §406(b) in each case to "take into consideration, among other factors . . . all other revenue of the air carrier."

Attention is called to our decision in *Summerfield, Postmaster General, et al. v. Civil Aeronautics Board*, Nos. 11259 and 11324. There, in an opinion by Judge Prettyman, we hold that profits derived by Western Airlines, Inc., from sale of an air route certificate with operating equipment cannot be excluded from revenue for the purpose of pro-[fol. 74] viding an industry incentive. We see no essential difference between that case and this.

The order of the Board of October 18, 1951, fixing mail pay for Chicago and Southern Airlines' Latin American operations is set aside and the case remanded with directions to determine and fix the rate in accordance with this opinion.

Reversed.

BAZELON, *Circuit Judge*, concurring: I add this comment to describe another difficulty stemming from the statutory inadequacies which are discussed in my concurrence this day in *Summerfield, et al. v. Civil Aeronautics Board*, No. 11259, and *Western Air Lines v. Civil Aeronautics Board*, No. 11324.

The Board refused to offset Chicago and Southern Air Lines' \$650,000 excess over anticipated domestic earnings in establishing the mail rate for international operations. It concluded that such refusal would further managerial incentive to low cost operation and high revenue production in the domestic division. This may well be a highly desirable economic objective. But the premise essential to the Board's conclusion is that the domestic excess is directly related to these factors. Neither the Board nor the courts on review can say whether that premise is valid. The statute does not separate need or subsidy payments from compensation for services. Hence it cannot be determined whether all or any part of this domestic excess is attributable to managerial efficiency reflected by low cost operation and high revenue production or to exorbitant subsidy payments included in Chicago and Southern's domestic mail rate. We cannot impute to Congress an intent that the Board should chart its course without such essential information.

[fol. 75] PRETTYMAN, *Circuit Judge*, dissenting: The court holds that in fixing mail pay for transportation in foreign commerce the Board must include as "other revenue" so-called "excess" earnings on domestic operations and must include that figure in its computation of the carrier's need. The court says that failure "to make the offset" is at variance with the plain meaning of the statute.

The court also expresses its understanding that the omission by the Board of the domestic profits from the calculation was for the purpose of establishing a new incentive policy. So the court finds no essential difference between this case and *Summerfield et al. v. Civil Aeronautics Board*, No. 11259, and *Western Air Lines v. Civil Aeronautics Board*, No. 11324, decided today. I agree that the statute does not authorize the Board to make the omission for the purpose of establishing an industry incentive. My reasons for that view are set out in detail in the opinion in the cases

mentioned. But I do not find that problem in the present case. To be sure, the same phrase of the statute—"all other revenue"—is involved in all three cases. But in the present case the problem is the extent to which the classification of rates authorized by the statute goes. When the statute authorizes one rate for foreign carriage and another rate for domestic carriage, does that cleavage go all through the accounts, so that "all other revenue" in the computation of a foreign rate really means all other revenue from the foreign operation? That problem was not in the other cases.

In its tentative findings in the case at bar the Board held that, without passing on any question of its power, it would as a matter of economic policy omit the domestic earnings from the foreign rate calculation. The Postmaster General challenged that action, maintaining that the statute (the "all other revenue" language in Section 406(b)) required the Board to offset the excess domestic earnings against the need resulting from foreign operations in establishing the foreign rates. In its final opinion the Board held [fol. 76] the statute did not so require. But the Board seems not to have rested that conclusion upon a premise that these earnings were not "other revenue" which it must take into consideration, but upon the premise that having taken them into consideration it could for economic reasons omit them from the calculation of the need in the foreign business. The Board then affirmed its former position that it would omit those earnings as a matter of economic policy. It recited several economic reasons why the domestic rates and the foreign rates should be determined separately; for example, that the more robust segment of the industry ought not to be burdened with the obligations of the economically weaker part; and, again, the desirability of preserving a comparative status of domestic carriers. The Board did not consider or decide whether it had power to include these earnings in the computation. It went only so far as to decide that it had power not to include them.

As I analyze the case, it falls into these questions: In fixing different rates for different services, must the Board "take into consideration" the sum total of all the revenue of the carrier from all its services? Or, on the contrary, in such a case does the statutory term "all other revenue" mean only revenue directly related to the service for which

the rate is being fixed; in other words, must the Board omit unrelated earnings from consideration? If the answer to the first question be "yes"—that is, if the Board must take into consideration the sum total of all the earnings of the carrier from all services—may the Board take such earnings into consideration but nevertheless, having considered them, omit them from the calculation of the separate rate?

The statute provides that the Board may fix different rates for different classes of service. Thus the Board clearly had power to fix different rates for international service and for domestic service. The statute provides that in determining the rate "in each case" the Board shall take into [fol. 77] consideration the need of the carrier for compensation sufficient to insure the performance of "such service". Then follows the provision that the Board shall consider the need of the carrier for compensation, "together with all other revenue of the air carrier," to enable the carrier to maintain and continue development.

The Supreme Court held in the *T. W. A.* case¹ that this is a rate-making process. It seems to me that the statute means that in fixing an international rate the Board should determine the amount needed by the carrier to perform that service and to maintain and continue development of that service. The Board should determine what amount the carrier needs, as payment for its international carriage of mail, to meet its foreign expenses and its allocated federal income taxes and receive a fair return on its foreign investment. It seems to me that the Board could require the foreign transportation and the domestic transportation to stand each on its own feet, neither to be supported by the other. When Congress gave the Board power to fix different rates for different classes of service, it meant for the Board to make separate calculations for each service and rate.

In this connection it seems to me that the concept of different rates for different services in carrying the mail has a definite bearing upon the meaning of "take into consideration". When the Board is fixing a particular rate it should

¹ *T. W. A. v. Civil Aeronautics Board*, 336 U. S. 601, 93 L. Ed. 911, 69 S. Ct. 756 (1949).

take into consideration factors related to that rate, and none other. Such is plain sense, a sort of rule of relevancy.

So I reach the conclusion that, when the Board is determining a separate rate for a certain type of mail service, the "all other revenue" which it must "take into consideration" means revenue related to that service for which the rate is being fixed. But, if I am in error in that conclusion [fol. 78] struction of those statutory terms, I am so convinced of the soundness of a complete separation of this foreign rate from the domestic operation that I would have to agree with the Board that the elastic statutory phrase "take into consideration" is sufficiently flexible to permit the omission of domestic earnings from the foreign calculation, even after such earnings are taken into consideration. It is noteworthy that the statute does not describe need as the remainder after all other revenue is deducted. The statute does not speak of offsets or deductions. The statute is affirmative in its prescription. It speaks of compensation which "together with" all other revenue will enable the carrier, etc. This is language appropriate to a measure of discretion in respect to the particular carrier and to the particular service. It seems to me that the intermingling of foreign and domestic factors in the computation of each separate rate would lead to great confusion and to inaccuracy in the supposedly separate results.

The Board said that the fact that the carrier had earned in its domestic operation \$654,000 more than had been anticipated created another problem, namely the problem whether the domestic rates had been fixed at too high a level. It directed its staff to begin an investigation of those rates. I think that was correct.

I would affirm the order.

[fol. 79] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT, APRIL TERM, 1953

No. 11,351

ARTHUR E. SUMMERFIELD, Postmaster General of the United
States, and The United States of America, on Behalf of
the Postmaster General, Petitioners,

v.

CIVIL AERONAUTICS BOARD, Respondent,
CHICAGO AND SOUTHERN AIR LINES, INC., a Corp., Intervenor
On Petition for Review of Order of the Civil Aeronautics
Board

Before Prettyman, Proctor and Bazelon, Circuit Judges

JUDGMENT AND DECREE—Filed May 4, 1953

This case came on to be heard on the transcript of the record from the Civil Aeronautics Board, and was argued by counsel.

On consideration whereof, it is adjudged and decreed by this Court that the order of the Civil Aeronautics Board on review in this case be, and the same is hereby, reversed and set aside, and that this case be, and it is hereby, remanded to the said Civil Aeronautics Board for further proceedings in accordance with the opinion of this Court.

Per Circuit Judge Proctor.

Dated: May 4, 1953.

Separate concurring opinion by Circuit Judge Bazelon.
Dissenting opinion by Circuit Judge Prettyman.

[fol. 80] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, APRIL TERM, 1953

[Title omitted]

ORDER—Filed June 30, 1953

Upon consideration of the motion of Delta Air Lines, Inc., for an order substituting Delta Air Lines, Inc., as a party intervenor in the above entitled case in the place of Chicago and Southern Air Lines, Inc., on the ground that Chicago and Southern Air Lines, Inc., was merged with Delta Air Lines, Inc., with Delta Air Lines, Inc., as the surviving corporation, and it appearing that no objections to said motion have been filed, it is

Ordered by the Court that the motion be granted and that Delta Air Lines, Inc., be, and it is hereby, substituted as an intervenor herein in the place and stead of Chicago and Southern Air Lines, Inc.

Dated: June 30, 1953.

Per Curiam.

[fols. 81-82] [File endorsement omitted]

DESIGNATION OF RECORD (Omitted in Printing)

[fol. 83] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 84-86] STIPULATION (Omitted in Printing)

[fols. 87-88] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1953

No. 222

CIVIL AERONAUTICS BOARD, Petitioner,

vs.

ARTHUR E. SUMMERFIELD, Postmaster General of the United
States, and the United States of America, on Behalf of
the Postmaster General

ORDER ALLOWING CERTIORARI—Filed October 12, 1953

The petition herein for a writ of certiorari to the United
States Court of Appeals for the District of Columbia Cir-
cuit is granted. The case is consolidated for argument with
Nos. 223, 224, and 225.

And it is further ordered that the duly certified copy of
the transcript of the proceedings below which accompanied
the petition shall be treated as though filed in response to
such writ.

The Chief Justice took no part in the consideration or
decision of this application.

[fols. 89-90] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1953

No. 223

DELTA AIR LINES, INC., Petitioner,

vs.

ARTHUR E. SUMMERFIELD, Postmaster General of the United
States, and the United States of America, on Behalf of
the Postmaster General

ORDER ALLOWING CERTIORARI—Filed October 12, 1953

The petition herein for a writ of certiorari to the United
States Court of Appeals for the District of Columbia Cir-

cuit is granted. The case is consolidated for argument with Nos. 222, 224, and 225.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

(1110)

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(I)

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. —

CIVIL AERONAUTICS BOARD, PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL
OF THE UNITED STATES, AND THE UNITED STATES
OF AMERICA, ON BEHALF OF THE POSTMASTER
GENERAL

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT*

The Civil Aeronautics Board respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on May 4, 1953.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 68) is not yet reported. The orders and findings of the Civil Aeronautics Board (R. 6, 51, 62) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1953 (R. 78). The jurisdic-

(1)

tion of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, after having classified an air carrier's domestic and international operating divisions as separate units for rate-making purposes, the Civil Aeronautics Board, in fixing a "fair and reasonable" need mail rate for the international division which encompassed a period during which a final need mail rate was in effect for the domestic operations, was required by Section 406 of the Civil Aeronautics Act to reduce, by the amount of profit earned above a specified fair return on investment under the final domestic rate, the international mail pay allowance to which the carrier otherwise was entitled.

2. Whether, when domestic and international operating divisions of the same air carrier reasonably are classified as separate rate-making units, Section 406 of the Civil Aeronautics Act requires the Board to reduce an otherwise "fair and reasonable" need mail rate for one division by the amount of profit above a specified fair return on investment which has been earned or is anticipated to be earned from the operation of the other division.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act, which will be referred to as the Act, are set forth in the Appendix, *infra*, pp. 20-23.

STATEMENT

At the time of the entry of the Civil Aeronautics Board order here involved, Chicago and Southern Air Lines, Inc. (C. & S.) conducted domestic operations over routes extending between Chicago and Detroit, on the one hand, and Houston and New Orleans, on the other, and international operations extending between Houston-New Orleans and Caracas, Venezuela via Havana and Kingston.¹ As is customary where a single carrier conducts both domestic and international operations of substantial size, the different divisions were classified by the Board as separate rate-making units for mail pay purposes, and different mail rates for the domestic and international divisions were fixed in different proceedings before the Board under its statutory authority to "fix different rates for different air carriers or classes of air carriers, and different classes of service" (Section 406 (b) *infra*, p. 22).

On July 28, 1948, the Board had fixed a final "need" or subsidy rate for the domestic operations to be effective on and after January 1, 1948. *Chicago and Southern A. L., Mail Rates*, 9 C. A. B. 786. The rate was an incentive sliding-scale rate

¹ C. & S. subsequently was merged into Delta Air Lines, Inc., and C. & S.'s certificates reissued to Delta. Delta was substituted in lieu of C. & S. as the intervenor below after the decision of the Court of Appeals (R. 79), and also has petitioned this Court for issuance of a writ of certiorari to review the judgment below. *Delta Air Lines v. Summerfield et al.*, this term.

designed to yield a higher return with either decreasing costs or increasing load factors, and was fixed at a level which, on the basis of predictions of future operations, would yield a return after taxes of 7.4% on investment allocated to the domestic operations.² The carrier actually earned a return on domestic investment of 12.51% for the years 1948-1950, or \$654,000 more than a return of 7.4% (R. 65).

International operations had been inaugurated in 1946, and temporary or provisional "need" rates had been fixed for those operations (R. 8). The order here involved fixed a final lump sum need rate for the international operations for the past period November 1, 1946-December 15, 1950, and a need rate for the future period beginning December 16, 1950 (R. 59). Section 406 (b) of the Act (*infra*, p. 22) provides in part that, in fixing "fair and reasonable" mail rates, the Board "shall take into consideration, among other factors," the "need" of the carrier for mail compensation which, "together with all other revenue of the air carrier," will enable the carrier to "maintain and continue the development of air transportation." The Postmaster General contended before the Board that, under these provisions, the \$654,000 above a 7.4% rate of return

² The carrier had been informed by the Board at the time the rate was fixed that any economies in operations which might be achieved would "inure to the carrier in the form of higher earnings" (9 C. A. B. at p. 812).

which had been earned under the final domestic rate mandatorily was required to be deducted from the international mail pay allowance for the same period. The Board held that (R. 54):

* * * while we are required to take into consideration the need of a carrier for mail compensation together with "all other revenue," we believe that we are not required by Section 406 (b) to reduce the carrier's mail pay with any part of such other revenue if there are sound reasons for not doing so as a matter of economic policy.

The Board concluded, as a matter of economic policy, that the offset contended for by the Postmaster General should not be made.³

In so concluding, the Board found that: (1) since final mail rates cannot always be fixed simultaneously for both international and domestic divisions, the incentive for efficient air carrier operations which results from final rates is such as to justify the fixing of final rates for one division in advance of the other and a subsequent

³ The Board determined that total mail pay should be allowed for the international operations for the past period in the amount of \$3,662,000 (R. 58). In so determining, the Board fixed the international "break-even need", i. e., the amount of money necessary to equalize income and outgo, at \$3,122,000 (R. 19). Return on international investment at the rate of 7% was allowed in the amount of \$393,000 (R. 23), and an allowance for actual tax liability was granted in the amount of \$147,000 (R. 57). After taking the \$654,000 in domestic profits into consideration, the Board determined not to reduce the international mail pay allowance by this amount.

refusal either to make up losses or offset profits resulting under the final rate when fixing final rates for the other division (R. 20, 21); (2) the comparative domestic status between domestic carriers having foreign routes and those which do not have foreign routes should be maintained by treating domestic and international operations as entirely separate, both for administrative reasons and so that uniform domestic class rates may be fixed for groups of domestic carriers under which there will be a competitive incentive for efficient domestic operations (R. 54, 55); and (3) domestic profits should not be required to be used to support economically weaker international operations in that such support will thwart the progress of domestic operations toward self-sufficiency and deprive the public of the advantages which will result from keeping the domestic industry in a financially sound position (R. 54).

The Court of Appeals, with one judge dissenting, reversed the Board's order. The majority opinion held that, although the Board had authority to fix rates separately for different operating divisions, "the end result of fixing rates for a carrier must not go beyond that point where the total subsidy exceeds the need of the carrier as a whole" (R. 71). The majority below also characterized the Board's action as "initiating a new 'incentive' policy" (R. 71). Stating that the Board had theretofore held that the "need" of an air carrier for mail pay was "that of the

air carrier as a whole and not that of any particular geographical division of its operations" (R. 72), and equating the statutory phrase "take into consideration" as equivalent to "offset," the majority stated (R. 72)

We agree with those pronouncements of the Board. We think they correctly indicate the duty of the Board in fixing "fair and reasonable rates of compensation" under § 406 (b) in each case to "take into consideration, among other factors * * * all other revenue of the air carrier."

Judge Prettyman would have affirmed the Board's order. His dissenting opinion states in part (R. 76, 77):

It seems to me that the Board could require the foreign transportation and the domestic transportation to stand each on its own feet, neither to be supported by the other. When Congress gave the Board power to fix different rates for different classes of service, it meant for the Board to make separate calculations for each service and rate.

* * * * *

So I reach the conclusion that, when the Board is determining a separate rate for a certain type of mail service, the "all other revenue" which it must "take into consideration" means revenue related to that service for which the rate is being fixed. But, if I am in error in that construction of those statutory terms, I am so convinced

of the soundness of a complete separation of this foreign rate from the domestic operation that I would have to agree with the Board that the elastic statutory phrase "take into consideration" is sufficiently flexible to permit the omission of domestic earnings from the foreign calculation, even after such earnings are taken into consideration.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding that Section 406 of the Act mandatorily required the reduction of the mail rate for C. & S.'s international division by the amount of profit above a 7.4% return on investment which had been earned under the final mail rate for the domestic division.

(2) In holding that, when domestic and international operating divisions of the same air carrier reasonably are classified as separate rate-making units, Section 406 of the Act requires the Board to reduce an otherwise "fair and reasonable" mail rate for one division by deducting, as "other revenue" against "need" for mail pay, profits above a specified fair return on investment which have been earned or are anticipated to be earned from the operations of the other division.

(3) In failing to recognize and to hold that, in fixing "fair and reasonable" mail rates, the Board has sound discretionary authority to refuse in ap-

propriate cases, for reasons of regulatory policy, to offset certain categories of "other revenue" against the "need" of air carriers for mail pay allowances.

(4) In holding that the Board's refusal to reduce C. & S.'s international mail pay allowance by deducting the profits above a 7.4% return on investment realized from the final domestic mail rate constituted a "new 'incentive' policy."

(5) In holding that prior rulings of the Board required the deduction of the domestic profits above a 7.4% return on investment from the international mail pay allowance.

(6) In reversing the order of the Board.

REASONS FOR GRANTING THE WRIT

This case raises questions of major importance in the administration of the Civil Aeronautics Act which have not been, but should be, passed upon by this Court. The majority below has required the Board to reduce a divisional mail rate otherwise "fair and reasonable" by the application of profits earned under a final mail rate order for another operating division of the carrier. The rule of law announced by the Court, if permitted to stand, will require the same action in other similar cases now pending before the Board. More important in its impact upon the administration of the Act and the air transportation system is the lower Court's denial to the Board of the discretionary authority conferred

by the Act and possessed by all regulatory agencies of classifying different operating divisions of a carrier as separate for rate-making purposes, and of fixing rates at a level which will sustain each operating division independently of the other.

Four of the present thirteen domestic trunk lines (Braniff, Delta-C. & S., Northwest, and TWA) engage in both domestic and international operations which, because of their extensive nature, are classified as separate units for rate-making purposes.* Because of the uncertainties of foreign operations and the necessity for experience as to the cost of operating foreign routes, the Board has been unable to fix final international rates as promptly as domestic ones. Accordingly, the Board in the past has fixed final rates from time to time for the domestic operations of all four of these carriers, while continuing temporary rates in effect for their international operations. The Board's action in fixing final domestic rates has been for the purpose of obtaining the benefits which flow from placing carriers on final rates under which they will either reap the benefits or stand the losses from future operations.

*Five other carriers (American, Eastern, United, National, and Colonial) conduct foreign or overseas operations which in the past have been regarded as separate units for rate-making purposes but which presently are regarded as "stub-end" operations sufficiently integrated with domestic operations so as to make feasible the fixing of mail rates on a system basis.

In some instances, these final domestic rates have been service or compensatory "class rates" under which the carriers have been forced to compete domestically with other carriers of their class in securing revenue and in reducing or controlling costs.⁵

The decision below makes no distinction between profits obtained under final need rates and those obtained under final service rates. None of the carriers were on notice that they would be required in effect to refund sums earned under these rates in the guise of having any domestic profits above a specified fair rate of return deducted from their international mail pay allowances.⁶ Proceedings are now pending before the

⁵ "Service rates" are rates which are regarded as containing no element of subsidy, and which merely provide just compensation for carrying the mail.

Domestically, TWA presently is classified with American, Eastern, and United as the "Big Four" carriers paid at the lowest service rate for domestic operations, 45 cents per mail ton mile. Braniff, Delta-C. & S., and Northwest presently are classified for domestic operations with three other domestic carriers (Capital, National, and Western) as falling within the group of carriers paid at a service rate of 53 cents per mail ton mile.

⁶ Contrary to the implications of the majority opinion (R. 72), the Board consistently has refused either to offset profits or make up losses resulting from final domestic rates when fixing international rates for the same period. See e. g., *Pennsylvania Cent. Air Et Al, Motions*, 8 C. A. B. 685, 703, *affirmed sub. nom. Transcontinental & Western Air v. Civil Aeronautics Board*, 83 U. S. App. D. C. 358, 169 F. 2d 893; 336 U. S. 601. The prior Board decisions relied upon by the majority below dealt either with cases in which the entire air carrier system was the rate-making unit, or where

Board for the fixing of final international rates for TWA and Braniff for periods which embraced operations under the final domestic rates. Under the decision of the Court of Appeals, any such profits realized by these carriers under their final domestic rates also are subject to recapture. Cf. *Transcontinental & Western Air v. Civil Aeronautics Board*, 336 U. S. 601.

Of greater concern to the Board, however, is the impact of the majority decision upon future administration of the Act, and the effect which it will have upon both domestic and international operations. Just as the opinion makes no distinction between profits realized under either need or compensatory rates, so also are the principles laid down by the Court applicable to the fixing of final rates for future periods. Profitable domestic operations presently are being conducted by most trunkline carriers under service or compensatory mail rates, and the Board is of the view that the public interest requires the retention of these domestic profits for the strengthening and improving of the domestic services. International operations are subsidized in the form of need rates, and the Board has anticipated that subsidy support will be required for international operations for some time to come. If the entire air carrier system must be used as the rate-making

the "excess profits" involved accrued under temporary rates and hence were subject to recapture either directly or by offset against subsidy need for other divisions.

unit in fixing rates for both past and future periods, then the Board's present classification procedures and practices in establishing domestic mail rates will be seriously impaired, together with their purposes and benefits.

Under the Court's decision, so-called "excess" domestic profits earned under service rates by carriers engaged in both domestic and international operations cannot be retained by them so long as subsidy support is required for their international operations. Rates which are truly final and which provide an incentive for efficient operations can never be fixed for one operating division in advance of the other. Further, it is unlikely that Braniff, Delta-C. & S., Northwest, and TWA, even under the most favorable and efficient operating conditions, can long be retained in their present domestic classifications or in their present category as service rate carriers for domestic operations. Present and foreseeable conditions in air transportation are such that the domestic earnings of these carriers under their existing service rates will be insufficient to support their international operations. The Board has tried to encourage efficiency in domestic service by grouping carriers together and fixing class rates. Under such rates the most efficient member of the class can earn a greater profit. Such incentive and classification disappear if the profits so made must go to subsidizing a losing international service. Indeed, the easy road for the

carrier is to become permanently subsidized as to its whole system. Such a tendency is hardly calculated to save the government money.

Of equal or greater impact upon the administration of the Act and the air transportation system is the threat posed by the decision below to the future participation in international operations by domestic carriers. The decision may compel the reorganization of our international air transportation system, and lead to the abandonment of international operations by domestic carriers contrary to the established policy of the government.

TWA operates a transatlantic route from New York to India via London, Rome, Cairo and the Middle East; Northwest operates a route to the Orient via Alaska and Tokyo; Braniff operates a route between the United States and Brazil and Buenos Aires via Havana, Balboa, and the west coast of South America. Chicago and Southern operates through the Caribbean area. These comprise important links in the organization of United States flag international air service. Every one of these routes was placed in operation with the approval of the President upon recommendation not only of the Board but also of interested departments, including the State Department and the defense establishment. They are operated and subsidy is provided for that purpose in large measure because of the relation-

ship of such operations to the security of the United States.

In each instance the Board selected a domestic carrier to operate the route because it found that such a carrier could do a cheaper and more effective job than other applicants and that such operations would contribute to the development of air transportation in accordance with statutory objectives.⁷ The alternatives were (a) monopoly in the hands of a non-domestic air carrier; (b) operation by a new corporation organized for that purpose with inadequate financing and experience to do the job required; or (c) operation by a surface carrier leading to a concentration of both surface and air transportation in the same hands contrary to long established national policy. All of these alternatives were and remain undesirable to the public interest. Yet the decision of the Court of Appeals could directly result in an undermining of the existing organization of our international air services and lead to the substitution of one of these undesirable alternatives.

⁷ The selection of domestic carriers to perform international services benefits international operations in that existing headquarter staffs and facilities can be used in both operations, thereby permitting more economical operations than would be possible if both operations were conducted by separate carriers. Further, carriers engaged in both operations can provide a more convenient international service through the medium of single-carrier service between all of the domestic and foreign points served by them than would be possible through interchange of traffic between separate carriers.

Domestic commercial rates must be maintained at approximately the same level for all of the trunk-line carriers for competitive reasons, and the carriers engaged in both domestic and international operations compete with carriers operating only domestically. If the unprofitable foreign operations are required to be supported from domestic profits, then carriers engaged in both types of operations will not obtain the earnings realized by wholly domestic operators. Under these circumstances, domestic carriers will no longer desire to conduct international operations.*

The decision below thus is of grave concern to the Board and the entire air transport industry. Moreover, we believe it to be erroneous. Proceeding upon the premise that mail rates are to be fixed in accordance with traditional public utility rate-making concepts, the majority below nevertheless has denied to the Board the traditional authority of rate-making bodies to establish separate rate-making units and to set rates at a level which will sustain the particular unit. Section 416 (a) of the Act (*infra*, p. 23) expressly em-

* The Board recently has instituted an investigation of a possible merger between Western Air Lines and Pacific Northern Air Lines, a carrier conducting operations within Alaska and between Alaska and the United States. Western has indicated to the Board since the decision below that it is not interested in the prospect of any such merger if as a consequence it will be required to utilize any profits on its domestic operations to support operations to and within Alaska.

powers the Board to classify carriers according to the "nature of the services performed," and Section 406 (*infra*, pp. 22-23) authorizes the fixing "from time to time" of "different [mail] rates for different air carriers or classes of air carriers, and different classes of service." Where a rate-making unit reasonably is established under the Board's classification powers, the Board in its sound discretion may regard that unit as the "air carrier" for purposes of Section 406. If the statutory requirement to "take into consideration * * * all other revenue of the air carrier" is equivalent to a command to offset all other revenue, then, as Judge Prettyman pointed out in his dissent (R. 76), the Board need offset only that other revenue attributable to the rate-making unit involved.

Further, if the term "air carrier" as used in Section 406 relates in all cases to the entire air carrier system, it still does not follow that revenues derived from domestic operations must be used to reduce mail pay for international operations. The duty of the Board is to fix a "fair and reasonable" mail rate, and a rate for one operating division does not become unreasonable as a matter of law merely because the rate is not reduced through the application of profits earned from operations of other divisions. "Need," and "other revenue" to be used in computing need, are merely factors which the Board is to "take into consideration, among other factors," in deter-

mining fair and reasonable rates. The other factors which the Board is required to take into account obviously include all of the purposes intended to be served by the Act (See Section 2, *infra*, p. 20). As Judge Prettyman indicated (R. 77), the Congress did not say that "all other revenue" must be offset against need for mail pay in all cases, or that the minimum amount necessary for continued operations always marks the limit of a fair and reasonable rate. It left to the Board the power and the duty to weigh and evaluate the various factors to be taken into account in fixing a fair and reasonable rate without binding the Board as to the part that its "consideration" of the individual factors shall play in the final determination. *cf. Secretary of Agriculture v. Central Roig Refining Co.*, 338 U. S. 604; *New York v. United States*, 331 U. S. 284, 345-349. We believe that the majority below has erroneously denied to the Board a clear discretionary authority conferred upon it by the Congress.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

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I hereby authorize the filing of the foregoing petition for a writ of certiorari.

✓ OSCAR H. DAVIS,
Acting Solicitor General.

APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,¹ are as follows:

DECLARATION OF POLICY

SEC. 2. In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-

¹ Act of June 23, 1938, c. 601, 52 Stat. 973; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401, et seq.

transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety, and

(f) The encouragement and development of civil aeronautics.

RATES FOR TRANSPORTATION OF MAIL

AUTHORITY TO FIX RATES

SEC. 406 (a) The [Board] is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropria-

tions for the transportation of mail by aircraft.

RATE-MAKING ELEMENTS

(b) In fixing and determining fair and reasonable rates of compensation under this section, the [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

* * * * *

CLASSIFICATION AND EXEMPTION OF CARRIERS**CLASSIFICATION**

SEC. 416 (a) The [Board] may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the [Board] finds necessary in the public interest.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 222

CIVIL AERONAUTICS BOARD, PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF
THE UNITED STATES, AND THE UNITED STATES OF
AMERICA, ON BEHALF OF THE POSTMASTER GEN-
ERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 68) is not yet reported. The orders and findings of the Civil Aeronautics Board (R. 6, 51, 62) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1953 (R. 77). The petition for a writ of certiorari was filed on July 31, 1953 and was granted on October 12, 1953 (R. 79). The jurisdiction of this Court rests on 28 U.S.C. 1254.

(1)

QUESTIONS PRESENTED

Under Section 406 of the Civil Aeronautics Act, the Civil Aeronautics Board is empowered to fix "fair and reasonable" mail rates at a level which, together with the carrier's "other revenue", will enable the carrier "to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." The questions presented are:

1. Whether, when domestic and international operating divisions of the same air carrier are classified as separate rate-making units, the Board mandatorily is required by Section 406 to reduce an otherwise "fair and reasonable" mail rate for one division by deducting revenue above a stated fair return on investment which has been earned from the operations of the other division.

2. Whether, in fixing "fair and reasonable" mail rates, the Board is precluded by Section 406 from declining, for developmental purposes, to reduce mail pay allowances by certain categories of "other revenue".

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act, which will be referred to as the Act, are set forth in the Appendix, *infra*, pp. 45 to 48.

STATEMENT

This case involves the validity of an order of the Civil Aeronautics Board which fixed a final mail

rate for a past period for the international operating division of Chicago and Southern Air Lines, Inc. (C. & S.). After the decision below, C. & S. was merged into Delta Air Lines, Inc. and C. & S.'s certificates were reissued to Delta. Delta was substituted as the intervenor below in lieu of C. & S. (R. 78), and presently is conducting operations over its prior routes and those of C. & S. as Delta-C. & S.¹

At the time of the entry of the rate order under review in this case, C. & S. conducted domestic operations over routes extending between Chicago and Detroit, on the one hand, and Houston and New Orleans, on the other, and international operations extending between Houston-New Orleans and Caracas, Venezuela via Havana and Kingston. Both operations were certificated for the transportation of persons, property and mail. See *Chicago and Southern A. L., Mail Rates*, 9 C.A.B. 786, 789, 790 (1948) ; R. 7. 8. As is customary where a single carrier conducts both domestic and international operations of substantial size, the different divisions were treated by the Board as separate rate-making units for mail pay purposes, and different mail rates for the domestic and international divi-

¹ Certiorari to review the decision below also has been granted on the petition of Delta. *Delta Air Lines, Inc. v. Summerfield et al.*, No. 223. These petitions have been consolidated for hearing with the petitions in Case Nos. 224 and 225, wherein certiorari was granted to review the judgment of the Court of Appeals in the companion decision in *Summerfield et al. v. Civil Aeronautics Board*, Nos. 11259, 11324. *Civil Aeronautics Board v. Summerfield et al.*, Case No. 224; *Western Air Lines v. Civil Aeronautics Board et al.*, Case No. 225. The Board has filed a separate brief in these latter cases.

sions were fixed in separate proceedings before the Board, with appropriate allocations of costs and investment between the two divisions.

On July 28, 1948, the Board had fixed a final rate for the domestic operations to be effective on and after January 1, 1948. *Chicago and Southern A. L., Mail Rates*, 9 C.A.B. 786 (1948). The domestic rate was an incentive sliding-scale rate designed to yield a higher return with either decreasing costs or increasing load factors, and was fixed at a level which, on the basis of predictions of future operations, would yield a return after taxes of 7.4% on investment allocated to the domestic operations. 9 C.A.B. at pp. 811, 812. The carrier actually earned a return on domestic investment of 12.51% for the years 1948-1950, or \$654,000 more than a return of 7.4% (R. 65).

C. & S. had inaugurated operations over its international routes in 1946, and temporary or provisional rates had been fixed for those operations (R. 8). The order here involved fixed a final rate for the international operations for the past period November 1, 1946-December 15, 1950, and a different final rate for a future period beginning December 16, 1950 (R. 58, 59). Section 406(b) of the Act (*infra*, p. 47) provides in part that, in fixing "fair and reasonable" mail rates, the Board "shall take into consideration, among other factors," the "need" of the carrier for mail compensation which, "together with all other revenue of the air carrier," will enable the carrier to "maintain and continue the development of air transportation to the extent and of the character and quality

required for the commerce of the United States, the Postal Service, and the national defense." The Postmaster General contended before the Board that the \$654,000 above a 7.4% return earned under the final domestic rate represented "excess profits" which, under the quoted statutory provisions, were required to be deducted as "other revenue" from the international mail pay allowance to which the carrier otherwise was entitled.

The Board held, however (R. 54):

* * * while we are required to take into consideration the need of a carrier for mail compensation together with "all other revenue," we believe that we are not required by Section 406(b) to reduce the carrier's mail pay with any part of such other revenue if there are sound reasons for not doing so as a matter of economic policy.

The Board concluded, on stated economic grounds, that the offset contended for by the Postmaster General should not be made. Accordingly, the Board found it unnecessary to reach the issues of whether the application of the profits to reduce the international rate would constitute a forbidden recapture of profits accruing under a final mail rate, as contended by the carrier and the rate division of the Board (R. 53); or whether the domestic profit was in fact excessive.²

² In fixing the domestic rate, the Board stated (*Chicago and Southern A. L., Mail Rates*, 9 C.A.B. 786, 812):

"An extra cushion against unforeseen developments will be provided to the extent that C. & S. succeeds in developing additional revenues from express, freight, and incidental sources above the level forecast for the future

In determining not to reduce the international rate by the \$654,000 in domestic profits, the Board found that: (1) since final mail rates cannot always be fixed simultaneously for both international and domestic divisions, the incentive for efficient air carrier operations which results from final rates is such as to justify the fixing of final rates for one division in advance of the other and a subsequent refusal either to make up losses or offset profits resulting under the final rate when fixing rates for

period. Similarly, any economies which the carrier's management succeeds in accomplishing through effective cost controls or improved operating procedures and techniques, which serve to avert or mitigate anticipated increases in prices and to decrease operating costs below the unit cost of 116.6 cents per revenue plane-mile estimated herein, will inure to the carrier in the form of higher earnings."

The higher earnings realized by C. & S. were attributable to operating economies and various accounting adjustments made in the depreciation account to reflect subsequent changes in the service life of DC-3 and DC-4 aircraft (R. 65), rather than to substantial increases in traffic.

After considering and excluding the \$654,000 domestic profit, the Board determined that total mail pay should be allowed for the international operations for the past period in the amount of \$3,662,000 (R. 58). In so determining, the Board fixed the international "break-even need", i.e., the amount of money necessary to equalize income and outgo for the international division, at \$3,122,000 (R. 19). Return on international investment at the rate of 7% was allowed in the amount of \$393,000 (R. 23), and an allowance for actual tax liability was granted in the amount of \$147,000 (R. 57). The reduction of the international allowance by the \$654,000 in domestic profits, it will be noted, would have resulted in the total revenues, including mail pay, of the international division being less than the costs of operating that division.

The total return on investment for both domestic and international operations of C. & S., viewed together for the period involved, was 11%. Had the \$654,000 been used to reduce the international mail pay, the total overall return would have been 7.3%.

the other division (R. 20, 21); (2) the comparative domestic status between domestic carriers having foreign routes and those which do not have foreign routes should be maintained by treating domestic and international operations as entirely separate, both for administrative reasons and so that uniform domestic class rates may be fixed for groups of domestic carriers under which there will be a competitive incentive for efficient domestic operations (R. 54, 55); and (3) domestic profits should not be required to be used to support economically weaker international operations in that such support will thwart the progress of domestic operations toward self-sufficiency and deprive the public of the advantages which will result from keeping the domestic industry in a financially sound position (R. 54).

The Court of Appeals, with Judge Prettyman dissenting, reversed the Board's order. The majority opinion, written by Judge Proctor and concurred in by Judge Bazelon, held that although the Board had authority to fix rates separately for different operating divisions, "the end result of fixing rates for a carrier must not go beyond that point where the total subsidy exceeds the need of the carrier as a whole" (R. 71). The majority opinion also characterized the Board's action as "initiating a new 'incentive' policy" (R. 71). Stating that the Board had theretofore held that the "need" of an air carrier for mail pay was "that of the air carrier as a whole and not that of any particular geographical division of its operations"

(R. 72), and equating the statutory phrase "take into consideration" as equivalent to "offset," the majority stated (R. 72)

We agree with those pronouncements of the Board. We think they correctly indicate the duty of the Board in fixing "fair and reasonable rates of compensation" under § 406(b) in each case to "take into consideration, among other factors * * * all other revenue of the air carrier."³

Judge Prettyman would have affirmed the Board's order (R. 76). His dissenting opinion (R. 73) points out that, under the decision of this Court in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601, the fixing of mail compensation is "a rate-making process" (R. 75). As such, he believed that the Board had statutory authority to fix entirely separate rates for the domestic and international services, and that the "other revenue" which the Board should take into consideration in fixing these separate rates is "revenue related to that service for which

³ In concurring in this decision (R. 73), Judge Bazelon indicated by reference to his concurring opinion in *Summerfield et al. v. Civil Aeronautics Board*, Nos. 11259, 11324, that, in his view, rate-making principles are unsuited for application to subsidy mail rates, and that the statute should be amended to differentiate between compensation for the carrying of the mail and need payments to subsidize the development of air transportation. Stating that the Board's action might well represent "a highly desirable economic objective", he thought it impossible for a Board or a Court to determine whether the \$654,000 profit was the result of an excessive domestic subsidy rate or attributable to managerial efficiency on the part of C. & S. He was unwilling to "impute to Congress an intent that the Board should chart its course without such essential information."

the rate is being fixed" (R. 76). If in error as to this view, he was of the further opinion "that the elastic statutory phrase 'take into consideration' is sufficiently flexible to permit the omission of domestic earnings from the foreign calculation, even after such earnings are taken into consideration" (R. 76).

SPECIFICATION OF ERRORS

The Court of Appeals erred:

(1) In holding that Section 406 of the Act mandatorily required the reduction of the mail rate for C. & S.'s international division by the amount of profit above a 7.4% return on investment which had been earned under the final mail rate for the domestic division.

(2) In holding that, when domestic and international operating divisions of the same air carrier reasonably are classified as separate rate-making units, Section 406 of the Act requires the Board to reduce an otherwise "fair and reasonable" mail rate for one division by deducting profits above a stated fair return on investment which have been earned or are anticipated to be earned from the operations of the other division.

(3) In failing to recognize and to hold that, in fixing "fair and reasonable" mail rates, the Board has sound discretionary authority to refuse in appropriate cases, for reasons of regulatory policy, to reduce mail pay allowances by certain categories of "other revenue".

(4) In holding that the Board's refusal to reduce C. & S.'s international mail pay allowance by

deducting the profits above a 7.4% return on investment earned under the final domestic mail rate constituted a "new 'incentive' policy."

(5) In holding that prior rulings of the Board required the deduction of the domestic profits above a 7.4% return on investment from the international mail pay allowance.

(6) In reversing the order of the Board.

SUMMARY OF ARGUMENT

I

One of the principal purposes of the Civil Aeronautics Act, and one of the primary duties of the Board thereunder, is the maintenance and development of a sound and adequate air transportation system (Section 2, *infra*, p. 45). For the furtherance of this objective, the Act provides for financial assistance to air carriers in the form of mail pay to be fixed by the Board under Section 406 (*infra*, p. 46). This mail pay, which may include subsidy elements, is to be fixed in accordance with rate-making principles. *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601. The rate-making principle of establishing, in appropriate cases, separate rate-making units for domestic and international operations of carriers engaged in both types of operations, and the fixing of mail rates for each division independently of the other, are deemed by the Board to be essential to the statutory objective of maintaining and developing a sound air transportation system.

International operations presently require sub-

sidy support. The domestic operations of the carriers comprised of both international and domestic operating divisions do not now require such support, and the carriers are paid domestically under class service mail rates which also are applicable to other air carriers who operate only domestically. Because of the differing factors affecting domestic and international operations, it is extremely difficult for the Board to fix a system rate for carriers comprised of both divisions, or to fix final rates for both divisions simultaneously. Yet maximum operating efficiency on the part of air carriers, and the development of air transportation, are promoted by placing and retaining carriers on final mail rates under which they either reap the benefits or stand the losses from future operations. Where those final rates are class service rates, as is now the case with domestic operations, additional benefits are obtained in that the carriers are forced to compete domestically with other carriers of their class in securing revenue and in reducing or controlling costs.

Under these circumstances, the Board believes that the air transportation system will be benefited by the fixing of final rates for the domestic divisions in advance of the international ones, rather than by retaining the entire air carrier systems on a temporary or cost-plus basis during the lengthy period required for the fixing of a final system rate or for the simultaneous fixing of final division rates. Moreover, even if the entire air carrier systems are used as the rate-making units, present

domestic earnings will not support international operations, and it may be expected that the carriers will simply become subsidized on a system rather than on a division basis. This result will carry no long-range attendant benefits, and will merely serve to destroy the benefits which presently flow from the Board's classification and rate-making policies. In addition, domestic earnings will no longer be available for use in providing improved domestic services and for reducing domestic rates.

The treating of the entire air carrier system as the rate-making unit also will be discriminatory between carriers. The carriers engaged in only domestic operations will be permitted to retain their profits, whereas those engaged in both types of operations will be required to use domestic profits for the support of losing international operations. Under these circumstances, they probably will attempt to withdraw from international operations, and the Board may find it necessary to authorize that withdrawal since a reluctant operator can hardly be expected to serve the best interests of the United States in the international field. The routes operated by them presumably must be operated by some carrier in accordance with present government policy. Carriers operating both domestically and internationally can operate both types of services more economically than can entirely separate carriers, and the substitution of entirely new carriers for the present ones would not result in any savings to the government. Neither would the public interest be served by the

alternatives of permitting a single United States international carrier to operate all United States flag international service, or the certification of surface carriers for international air operations.

II

The complete separation of domestic from international operations is well within the Board's statutory authority. Section 416(a) (*infra*, p. 48) empowers the Board to classify carriers according to the "nature of the services performed," and Section 406 authorizes the fixing "from time to time" of "different [mail rates] for different air carriers or classes of air carriers, and different classes of service." Moreover, all rate-making agencies are vested with sound discretionary authority to establish rate-making units in appropriate cases within a single corporate utility system. *American Toll Bridge Co. v. Railroad Commission of California*, 307 U.S. 486, 494; *Illinois Commerce Commission v. United States*, 292 U.S. 474, 486; *Wabash Valley Electric Co. v. Young*, 287 U.S. 488, 497, 498. Where a rate-making unit reasonably is established under the Board's classification powers, the Board may regard that unit as the "air carrier" for purposes of Section 406. If the statutory requirement to "take into consideration * * * all other revenue of the air carrier" is equivalent to a command to offset all other revenue, the Board need offset only that other revenue attributable to the rate-making unit or class of service involved.

If the term air carrier as used in Section 406

relates in all cases to the entire air carrier system, the Board still is not mandatorily required to reduce mail pay allowances by all of the other revenue. The "need" to which reference is made in Section 406 embraces the public need for a sound and adequate air transportation system as well as the private revenue need of an air carrier. The statute speaks in terms of enabling the carrier to "maintain and continue the development of air transportation," and not in terms of merely enabling the carrier to maintain an existing operation. The statute does not speak of offsets or deductions of "other revenue." Rather, the "other revenue" is simply a factor which the Board "shall take into consideration" in determining the amount of mail pay necessary for the furtherance of the statutory goal of developing a sound and adequate air transportation system. The weight to be given this factor is left to the sound judgment of the Board. *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 611, 612; *New York v. United States*, 331 U.S. 284, 345-349.

The Board considered all required factors in fixing the rate for C. & S., including the "other revenue" and the overall purposes of the Act embodied in Sections 2 and 406. It found the international mail pay allowance to be "fair and reasonable" in the light of these factors. The finding that the "other revenue" should be excluded is the equivalent of the finding insisted upon by the Postmaster General that there was "need" for the additional compensation provided in this manner. The car-

rier had need for the allowance so that it would have an incentive for conducting efficient domestic operations and for vigorously promoting and developing international services. There was a public need for the Board's action so that a sound and adequate air transportation system might be developed.

ARGUMENT

I. The Board's Order Furthers the Objectives of the Civil Aeronautics Act

A. The applicable statutory provisions and their purposes

Prior to the passage of the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. 401 et seq.), there was no comprehensive statutory scheme for the overall development and regulation of this nation's air transportation system. Various preliminary developmental and regulatory steps had been taken, however, as the art of flight developed and as Congress became increasingly aware of the importance of civil air transport to commerce and defense needs. The Air Commerce Act of 1926 (44 Stat. 568) had imposed safety control, and also had provided for governmental assistance in the form of navigational aids and other operating facilities. Beginning in 1925 and continuing to 1938, a series of statutes had provided a measure of direct financial assistance to the airlines in the form of compensation for the transportation of air mail under contracts let by the Post Office Department, and these statutes also provided for some economic regula-

tory control over air mail contractors.⁴ In the Air Mail Act of 1934, provision also had been made for the establishing of a Federal Aviation Commission to report to the Congress by February 1, 1935 its recommendations for a broad governmental policy covering all phases of aviation (48 Stat. 938).

Subsequent to the report of this Commission (Sen. Doc. No. 15, 74th Cong., 1st Sess.), which had recommended affirmative legislative steps for the fostering and developing of the new medium of transportation, including the payment of subsidies, numerous aviation regulatory bills were introduced into the 74th and 75th Congresses, and extended hearings were held thereon. The Report of the Federal Aviation Commission, these hearings, and the Congressional debates which preceded the passage of the Act, all disclose that the infant air transportation industry was in critical straits, due in part to the need for additional revenues and in part to the lack of any adequate and stable governmental regulatory policy.⁵

As the culmination of these proposals, the Civil Aeronautics Act of 1938 was adopted. The Act supplanted for the most part the various aviation

⁴ Air Mail Act of 1925, 43 Stat. 805, as amended 44 Stat. 692, 46 Stat. 259; Air Mail Act of 1934, 48 Stat. 933, as amended 48 Stat. 1243, 49 Stat. 30, 49 Stat. 614, 52 Stat. 6, 52 Stat. 218.

⁵ See *e.g.*, 83 Cong. Record 6405, 6507, 6627, 6631, 6634, 6635; Hearings before the Committee on Interstate and Foreign Commerce, House of Rep., 75th Cong., 3rd Sess., on H.R. 9738, pp. 298-301, 337-338; Hearings before the Committee on Interstate and Foreign Commerce, House of Rep., 75th Cong., 1st Sess., on H.R. 5234 and H.R. 4652, p. 40; Report of the Federal Aviation Commission, Sen. Doc. No. 15, 74th Cong., 1st Sess., pp. 43-97.

statutes heretofore mentioned (See 52 Stat. 1028, 1029), and embodied a comprehensive and stable scheme for the development and regulation of air transportation both from a safety and economic standpoint. The Congressional declaration of policy, as well as the legislative history, discloses that one of the primary purposes of the Act and duties of the Board is the "encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense" (Section 2(a), *infra*, p. 45). The Congress conceived such a system to be one from which the public would receive safe and "adequate, economical, and efficient service" under regulation designed to "foster sound economic conditions" in the industry. (Sections 2(b) and 2(c), *infra*, p. 45. It sought to prevent monopolies and to insure that degree of competition necessary for the growth of a healthy transportation system both domestically and internationally (Section 2(d), *infra*, p. 45). It was particularly concerned with the leadership of this nation in international civil aviation, and with the defense and international relations potentials of air transport.⁶

Full public utility control over air carriers was imposed by the Act to the end that these statutory objectives might be achieved. Appropriate author-

⁶ See *e.g.*, the statements in the Congressional debates by Congressman Boren (83 Cong. Record 6405), by Congressman Randolph (83 Cong. Record 6507), and by Senator McCarran (83 Cong. Record 6635).

ity was conferred upon the President to act with respect to specified matters involving international air transportation (Section 801, 49 U.S.C. 601, see *Chicago & Southern Air Lines, Inc., v. Waterman Steamship Corp.*, 333 U.S. 103). Broad administrative powers also were conferred upon the Board (Section 205(a) *infra*, p. 46), including the specific power to establish classifications of air carriers for regulatory purposes "as the nature of the services performed by such air carriers shall require * * *" (Section 416(a), *infra*, p. 48).

Since the industry had not reached the stage of economic self-sufficiency, the Congress also provided a method for financial assistance to air carriers. The recommendation of the Federal Aviation Commission for direct subsidies was not followed, however. Rather, financial assistance was to be provided in the form of mail rates to be fixed by the Board under the provisions of Section 406 (*infra*, p. 46), at a level which will enable the carrier "to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." Section 406 also reflects the various classification and administrative powers otherwise conferred upon the Board. The section leaves to the Board the determination of the appropriate "method or methods" for ascertaining "rates of compensation for each air carrier or class of air carriers," and provides that the Board "from time to time" may "fix different rates for different air

carriers or classes of air carriers, and different classes of service." In short, complete rate-making powers are conferred, and complete administrative flexibility is provided.

Financial assistance in the form of mail rates, rather than by direct subsidy, was selected by Congress in part because it represented the traditional method of governmental support for air transportation and because it was realized that mail compensation would be an important part of the carriers' revenues even though that compensation might constitute only a fair return on investment allocated to the mail service.⁷ In equal part, we believe, this method of assistance was provided because it carried with it the benefits and incentives for efficient operations which flow from rates, and because the Congress believed that rate-fixing techniques in the administration of what is termed subsidy mail pay would insure a more rapid realization of the statutory goals.

The bases for this belief have heretofore been

⁷ The Board has developed two types of mail rates under Section 406. One is the service rate, designed to provide compensation for the service of transporting the mail, an important and substantial part of a carrier's traffic. This rate is fixed in terms of rates for mail actually transported, such as, for example, 45 cents per mail ton-mile. See *e.g.*, *Eastern A. L., Mail Rates*, 6 C.A.B. 551 (1945); *Transcontinental & Western Air, Inc., Mail Rates*, 6 C.A.B. 595 (1945). The other is the so-called subsidy or need rate. This latter rate is fixed at a level greater than that necessary to provide a fair return on investment allocated to the mail service, and customarily is fixed in terms of a formula geared to aircraft miles flown. See *e.g.*, R. 33; *Chicago and Southern A. L. Mail Rates*, 9 C.A.B. 786 (1948). Both the domestic and international rates of C. & S. here involved were need rates.

fully advanced to this Court in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601, and will not be repeated here. That decision firmly established, in our view, that Congress did not intend to break with the "traditions of rate-making" in providing financial assistance to air carriers (336 U.S. at p. 605), and that rate-fixing techniques in the administration of the mail pay provisions are an integral part of the regulatory scheme. Our point at this stage of the brief is that these provisions were designed and intended to be used, to the extent that their terms and rate-making principles permit, for the achieving of the objectives specified in the Congressional declaration of policy contained in Section 2 (*infra*, p. 45) and repeated in Section 406 (*infra*, p. 48). This fact has heretofore been recognized in the *Transcontinental & Western Air* case, just as the rate-making powers of the Interstate Commerce Commission have been recognized as an appropriate means for furthering the National Transportation Policy. See, e.g., *King v. United States*, 344 U.S. 254, 263, 264; *Baltimore & Ohio Railroad Co. v. United States*, 345 U.S. 146, 150; *cf. New York v. United States*, 331 U.S. 284, 345-349.

B. The reasons for the Board's order

The principle urged upon the Board by the Postmaster General and accepted as law by the Court of Appeals in substance is that the entire air carrier system of any corporate air carrier must be regarded as a single unit for need or subsidy

purposes, and that the Board cannot grant need mail pay for the operation of one division so long as the carrier has or reasonably may anticipate revenues from another division which can be used to sustain the operation. The principle makes no distinction between profits obtained under final or temporary divisional rates, or between profits from need or service rates. It applies to rates fixed for future periods as well as to rates for past periods.⁸

The Board was, and is, of the opinion that "the principles of the Act will not be best served now" by the acceptance of the Postmaster General's position (R. 21). See, also, *Delta Air Lines, Inc., Mail Rates, Latin American Operations*, C.A.B. Order No. E-7738, Docket No. 6110, September 21, 1953. The reasons for this conclusion can best be explained against the background of present conditions in the air transportation industry.

Four of the thirteen domestic trunk lines (T.W.A., Braniff, Delta-C. & S., and Northwest) presently are engaged in both domestic and international operations which are classified by the Board

⁸ The Postmaster General is contending before the Board that domestic profits obtained under service rates by TWA and Braniff must be used to reduce the carriers' international mail pay allowances for past periods, and that a final need rate for a future period for the international operations of Delta-C. & S. must be reduced through the application of anticipated future domestic earnings above a stated rate of fair return under a final domestic service rate. The Board thus far has declined to accede to these contentions, and has adhered to the principles enunciated in this case. *Braniff Final Mail Rate Case*, C.A.B. Order No. E-7815, Docket No. 5142, October 13, 1953; *Delta Air Lines, Inc., Mail Rates, Latin American Operations*, C.A.B. Order No. E-7738, Docket No. 6110, September 21, 1953.

as separate units for rate-making purposes.⁹ TWA operates a trans-Atlantic route from New York to India via London, Paris, Rome, Cairo and the Middle East.¹⁰ Northwest operates a route to the Orient via Alaska and Tokyo.¹¹ Braniff operates a

⁹ Five other carriers (American, Eastern, United, National and Colonial) conduct foreign or overseas operations which in the past have been regarded as separate units for rate-making purposes but which presently are regarded as "stub-end" operations sufficiently integrated with domestic operations so as to make feasible the fixing of rates on a system basis. See C.A.B. Publication "Administrative Separation of Subsidy From Total Mail Payments to United States International, Overseas and Territorial Air Carriers", 1952, pp. 7 and 8.

The Board has summarized its criteria for determining whether domestic and international operations shall be regarded as separate units or as a single unit for rate-making purposes as follows (*National Airlines Mail Rate*, Order No. E-6344, dated April 21, 1952):

"There have been various criteria developed to guide the Board's determination of whether a single rate should be set for the foreign operations of a domestic carrier. One is the size of the foreign operation in relation to the total operations of the given carrier; another, the absolute size of the foreign operations; and a third, the extent to which the foreign operations are integrated with the domestic. To establish grounds for separate treatment it must be demonstrated that the foreign operations are large relative to the domestic operations of the carrier; that the foreign operations are so large that it would be neither practical nor feasible to attempt to set a system rate; and that the domestic and foreign operations are carried on more or less independently of each other."

The domestic and international operations of TWA, Braniff, Delta-C. & S. and Northwest are such, in the Board's view, as to warrant their being treated as separate for rate-making purposes. The reasonableness of the Board's action in classifying C. & S.'s divisions as separate for administrative purposes was not challenged below.

¹⁰ *Northeast Air, Et Al., North Atlantic Routes*, 6 C.A.B. 319 (1945); *North Atlantic Route Transfer Case*, 11 C.A.B. 676 (1950); *North Atlantic Certificate Renewal Case*, C.A.B. Opinion and Order E-6560, Docket No. 5065, June 16, 1952.

¹¹ *Northwest Airlines, Inc., Et Al., Pacific Case*, 7 C.A.B. 209 (1946); 7 C.A.B. 599 (1946).

route between the United States and Brazil and Buenos Aires via Havana, Balboa, and the west coast of South America.¹² Delta-C. & S. operates through the Caribbean area to Venezuela and San Juan.¹³

International operations are affected by unsettled world conditions, by operating problems not present in domestic operations, and by strong competition from government-owned foreign flag carriers brought about in large measure by the need for granting reciprocal operating rights. Moreover, as this Court recognized in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 108, “. . . aerial navigation routes and bases should be prudently correlated with facilities and plans for our own national defenses and raise new problems in conduct of foreign relations. . . .” Defense and international relations considerations, rather than purely economic considerations, often largely determine whether a particular international operation shall be conducted. All of these factors add to the necessity for subsidy support.¹⁴ The international operations of all four carriers, together with those of Pan American and Panagra, presently are subsidized, and the Board has esti-

¹² *Additional Service to Latin America*, 6 C.A.B. 857 (1946).

¹³ *Ibid*; *Delta-Chicago and Southern Merger Case*, C.A.B. Order E-7052, Docket No. 5546, December 24, 1952.

¹⁴ The international operations of TWA, Braniff, Delta-C. & S., and Northwest comprise important links in the organization of United States flag international service. They are operated and subsidy is provided for that purpose in large measure because of the relationship of such operations to the security and welfare of the United States.

mated that such support will be required for some time to come.¹⁵

The carriers' domestic operations, however, presently are not subsidized, and are conducted under service mail rates applicable to other domestic operations. TWA is classified with American, Eastern and United as the "big Four" carriers now paid at the lowest service rate for domestic operations, presently 45 cents per mail ton-mile.¹⁶ Delta-C. & S., Braniff, and Northwest are classified with three other domestic carriers (Capital, National and Western) as falling within the group now paid at a service rate of 53 cents per mail ton-mile.

If the domestic operations are not kept separate from the international ones, it will be extremely difficult for the Board ever to obtain the benefits which flow from any type of final rates in the cases of TWA, Braniff, Delta-C. & S., and Northwest. As the Board pointed out (R. 20), the different problems involved in fixing domestic and international rates are such that final domestic rates can be fixed more promptly than international ones. The factors affecting international operations also make it virtually impossible to fix any system rate which can be expected to continue for any extended period of time for the four carriers comprised of both domestic and international divisions (R. 20). Further, it is difficult from an ad-

¹⁵ See C.A.B. Publication "Administrative Separation of Subsidy from Total Mail Payments to United States International, Overseas and Territorial Air Carriers", 1952, p. 4.

¹⁶ See C.A.B. Publication "Administrative Separation of Subsidy from Total Mail Payments to United States Air Carriers", October 1952 Revision, Appendix 3.

ministrative standpoint either to fix a system rate or to simultaneously fix final rates for both divisions in which a balance may be struck between either past or projected divisional operations (R. 20). The Board thus has little practical choice other than to retain the carriers on what amounts to a cost-plus system basis for extended periods of time, or to fix final rates on a divisional basis as rapidly as possible. It has elected to follow the latter course of action.

In the instant case, it fixed a final need rate for C. & S. so that the carrier would have an incentive for efficient domestic operations. Under present conditions, still further benefits are obtained in that the carriers comprised of both domestic and international divisions conduct their domestic operations under class service rates which force them to compete with other carriers of their class in securing revenues and in reducing or controlling costs. These benefits can not be realized as a practical matter if the entire air carrier system is to be used as the rate-making unit.

It is no answer to say, as did the Postmaster General below, that the Board may continue its present classification procedures and continue to fix rates separately for the operating divisions as an administrative matter, including class service rates for domestic operations. In the first place, a rate which is final only in the sense that the carrier bears the losses resulting therefrom does not promote the same operating efficiency and economy, and consequent development of air transportation,

that flows from a rate which is truly final and under which the carrier reaps the benefit as well as standing the loss.¹⁷

Secondly, if the entire air carrier system is to be used as the ultimate rate-making unit, we believe that TWA, Braniff, Delta-C. & S., and Northwest would soon be removed from their status as domestic service rate carriers, assuming that they continue to operate in the international field. Present and foreseeable conditions in air transportation are such that the domestic earnings of these carriers under their existing service rates will be insufficient to support their international operations. As the Board found (R. 54), the carrying of inter-

¹⁷ We interpret the decision by this Court in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U. S. 601, as precluding the making up of losses which occur under a final division rate when fixing rates for the other division. There TWA was operating under a final domestic rate and under a temporary international rate when the domestic losses occurred. The Board stated that "TWA's domestic and international operations are separate units for rate-making purposes", and indicated that it lacked power to fix a system rate which would encompass both operating divisions retroactive to the time of the institution of the international rate proceeding. *Pennsylvania Cent. Air, Et Al., Motions*, 8 C.A.B. 685, 703 (1947). We realize that this precise point was not urged to the Court in the TWA case. Nonetheless, we think the principles there enunciated with respect to making up losses are equally applicable to both division and system rates. Moreover, if the Board had power to make up TWA's losses in fixing a final rate for the international operations, the TWA litigation was no more than an exercise in semantics.

The Postmaster General argued below, and the Court of Appeals tacitly assumed, that a distinction exists between making up losses and determining the amount of additional compensation needed, and that "offset" is not "recapture." Whatever may be the Board's power with respect to making offsets of the type under discussion, it has not yet chosen to follow that course of action.

national operations on the back of domestic operations would be "subjecting the latter to an unjustifiable strain." Under these circumstances the carriers presently must be subsidized on either a division or a system basis. While the immediate subsidy bill would be lower if the entire air carrier system were used as the rate-making unit, the incentive for efficient domestic operations would be destroyed. No benefit would result to the carrier from reducing or controlling domestic costs. Rather, the easy road would be to become permanently subsidized on a system basis, a course of action not calculated to save the government money in the long run. Further, the Board's classification procedures with their benefits to the Board for use in comparative rate-making techniques would be largely eliminated. The combined domestic and international operations obviously would be dissimilar to either the domestic or international operations of the carriers with which they presently compete.

There are other benefits to the domestic system which flow from the separation of domestic and international operations. The carriers under discussion operate a substantial segment of the domestic air transportation system. The retention of domestic profits for the benefit of domestic operations permits the carriers to obtain more modern aircraft and otherwise to offer improved domestic services to the public. The Board is of the view that these profits should be retained for that purpose (R. 54). Keeping the domestic industry in a sound financial position also will further the ulti-

mate goals of permanently eliminating subsidy from domestic trunk line operations, and of reducing domestic commercial rates with new impetus to the development of the domestic industry (R. 54).

International operations and government policies also will be affected under the Postmaster General's policy. Domestic commercial rates for passengers and property must be maintained at approximately the same level for all of the trunk line carriers for competitive reasons. TWA, Braniff, Delta-C. & S., and Northwest all compete domestically with other trunkline carriers engaged predominantly or entirely in only domestic operations, many of which either do not require subsidy support or are rapidly approaching that stage. If domestic profits must be used to support the losing international operations, then the carriers will not obtain the same profits realized by their competitors. Under these circumstances, the domestic carriers will no longer desire to continue or expand their international operations, nor will other domestic carriers care to enter the international field.¹⁸ This desire will not stem entirely from the immediate profit motive. Airline operations are intensely competitive, and the carriers can hardly

¹⁸ The Board recently suggested a possible merger between Western Air Lines and Pacific Air Lines, a carrier conducting operations within Alaska and between Alaska and the United States. Western has indicated to the Board since the decision below that it is not interested in the prospect of any such merger if as a consequence it will be required to utilize any profits on its domestic operations to support operations to and within Alaska.

hope to hold their present domestic competitive positions if their profits are siphoned off for other purposes, and those of their competitors are not.

The Board may of course be able to require the carriers to continue their present international operations even if the views of the Postmaster General ultimately prevail. However, the type of operations and developmental activities which may be expected of a reluctant operator are hardly calculated to serve the best interests of the United States in the international field. A withdrawal of the present domestic operators from the international field or a failure on their part to expand or vigorously promote international operations will have serious consequences. Consistently with the policy against monopoly (Section 2(d), *infra*, p. 46), the established policy of this government is for more than one American flag carrier to operate internationally, and for competition between American flag carriers where possible. See *e.g.*, *American Export Air, Transatlantic Service*, 2 C.A.B. 16 (1940); *Northeast Air, Et Al., North Atlantic Routes*, 6 C.A.B. 319 (1945); *North Atlantic Route Transfer Case*, 11 C.A.B. 676 (1950). The selection of domestic carriers to perform international service benefits international operations in that existing experienced headquarters staffs, trained operation crews and workers, and shops for the maintenance and repair of aircraft are immediately available and can be utilized in both operations. *Northeast Air, Et Al., North Atlantic Routes*, *supra*, 6 C.A.B. at pp. 326-327. The use of

these existing facilities, and the spread of overhead costs, enables both domestic and international operations to be performed more economically than would be possible if the operations were conducted by entirely separate carriers. Further, carriers engaged in both operations can provide a more convenient international service through the medium of single carrier service between all of the domestic and foreign points served by them than would be possible through interchange of traffic between separate carriers. *Additional Service to Latin America*, 6 C.A.B. 857, 900, 910 (1946).

These factors played an important part in the certification for international operations of Braniff, C. & S., Northwest and TWA. The alternatives to certificating a domestic carrier were (a) monopoly in the hands of a non-domestic air carrier; (b) operation by a new corporation organized for that purpose with inadequate financing and experience to immediately do the job required and with the prospect of greater costs to the government; or (c) operation by a surface carrier leading to a concentration of both surface and air transportation in the same hands contrary to established national policy. All of these alternatives were and remain undesirable to the public interest. Yet one of these alternatives may be required under the policy espoused by the Post Office Department and accepted as law by the Court of Appeals.

II. The Board's Order Is Within Statutory Authority

- A. *The Civil Aeronautics Act authorizes the establishing of domestic and international operating divisions of the same air carrier as separate rate-making units, and the fixing of mail rates for one division without regard to the operations of the other*

Mail rates are to be fixed in accordance with rate-making principles. *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601. Moreover, Section 416(a) (*infra*, p. 48) empowers the Board to classify carriers according to the "nature of the services performed", and Section 406(b) (*infra*, p. 47) authorizes the fixing "from time to time" of "different [mail] rates for different air carriers or classes of air carriers, and different classes of service." These powers are consistent with the fundamental tenet of public utility law that regulatory agencies are vested with sound discretionary authority to determine appropriate units of rate making and to fix rates separately at a level which will sustain the particular unit. See *e.g.*, *American Toll Bridge Co. v. Railroad Commission of California*, 307 U.S. 486, 494; *Illinois Commerce Commission v. United States*, 292 U.S. 474, 486; *Wabash Valley Electric Co. v. Young*, 287 U.S. 488, 497, 498; *Gilchrist v. Interborough Co.*, 279 U.S. 159, 209-210.

Whether the question of statutory authority to fix entirely separate mail rates for domestic and international operating divisions is viewed as one

of treating the divisions as separate rate-making units, or of fixing separate rates for different classes of service as Judge Prettyman viewed the issue (R. 76), we believe the Board's power to be equally plain.¹⁹ Where a rate-making unit is established under the Board's classification powers, we believe that the Board in its sound discretion may regard that unit as the "air carrier" under the so-called need provisions of the statute,²⁰ just as rate-making units of the type involved in the last cited cases (*supra*, p. 31) are regarded as the utility or carrier for which the rates are being fixed. If the problem is viewed as one of fixing rates for different classes of service as, for example, intrastate and interstate or other segregated services, the result should be the same. See *e.g.*, *The Minnesota Rate Cases*, 230 U.S. 352, 435; *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148; *Banton v. Belt Line Ry.*, 268 U.S. 413, 421; *Northern Pacific Ry. v. North Dakota*, 236 U.S. 585, 598.

In either case, if the statutory requirement to

¹⁹ The need mail rate is fixed on the basis of total operations included in the particular rate-making unit, and constitutes a single rate for the entire operations of that unit. Thus the questions of rate-making unit and fixing rates for separate classes of service are essentially the same.

²⁰ These are the provisions of Section 406(b) (*infra*, p. 47) which direct the Board, "in determining the rate in each case", to "take into consideration, among other factors, . . . the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

"take into consideration . . . all other revenue of the air carrier" is equivalent to a command to offset all other revenue, then, as Judge Prettyman pointed out in his dissent (R. 76), the Board need offset only that other revenue attributable to the rate-making unit or class of service involved. The inquiry may be restricted to whether the rate being fixed is fair and reasonable. If the rate for another division of the carrier is exorbitant, it may be reduced. *Cf. Northern Pacific Ry. v. North Dakota*, 236 U.S. 585, 598. The time and place to determine the reasonableness of the rate for the other division is in a direct proceeding for that purpose.²¹

No question has been raised concerning the reasonableness of the rate for C. & S.'s international operations, viewed alone. Moreover, the majority below recognized the "Board's authority to fix rates separately for different operating divisions of the carrier" (R. 71). We assume that there is little question but that the Board may establish entirely separate rate-making units for the determination of service mail rates, or for the fixing of commercial rates even though a rate-making factor in determining commercial rates also is "the need of each air carrier for revenue . . .". Section 1002(e), 49 U.S.C. 642(e). The majority of the Court of Appeals believed, however, that the term "need of each such air carrier" as used in Section

²¹ The Board in fact instituted a proceeding to determine whether C. & S.'s domestic rate should be reduced (R. 53), and thereafter reduced the rate. See also R. 76.

406(b) related to the entire air carrier system. Where subsidy is involved in any portion of an air carrier's system, it construed the phrase to be a limitation upon the express administrative and rate-making powers conferred by other portions of Section 406 and other sections of the statute. It held that, in fixing subsidy pay, division rates must be fixed in the light of the carrier's overall system position.

It is not believed that a mere descriptive phrase such as "air carrier" can serve to override the other express powers conferred. We are aware of no legislative history which requires the construction of the majority, and there are no indicia on the face of the statute which compel that result. The statute does not distinguish between need and service rates, and the "method or methods" for fixing both need and service rates are expressly committed to the competence of the Board (Section 406(a), *infra*, p. 46, see, also, Section 205(a), *infra*, p. 46). Moreover, under the decision below, the Board cannot as a practical matter exercise its other express powers to classify air carriers (Section 416(a), *infra*, p. 48), and to fix "from time to time . . . different rates for different . . . classes of air carriers, and different classes of services" (Section 406, *infra*, p. 46). Yet Section 2(d) (*infra*, p. 45) "looks to the sound development of an air transportation system through competition", and the uniform class rate is an appropriate method of providing for this competitive development. *Transcontinental & Western Air*,

Inc. v. Civil Aeronautics Board, 336 U.S. 601, 606. Section 406 should be construed to "harmonize with the apparent design of the Act" (*ibid.*), and a construction is indicated which will accommodate these classification and rate-fixing powers and enable the Board to discharge its functions. See, also, *United States v. American Trucking Associations*, 310 U.S. 534, 542-544; *Gemsco, Inc. v. Walling*, 324 U.S. 244; *American Trucking Associations v. United States*, 344 U.S. 298.

Neither do we believe that the majority below were warranted in holding that the construction placed by them upon the statute accorded with the "established construction" of the Board (R. 72), or that the Board's action in this case constituted the initiation of a "new incentive policy" (R. 71). The Board consistently has followed the policy here involved of neither offsetting profits nor making up losses resulting from final division rates, and of otherwise treating domestic and international operations as separate in appropriate cases. The Board, it is true, has said "[t]he 'need' is that of the air carrier as a whole and not that of any particular geographical division of its operations." *Chicago and Southern A. L. Mail Rates*, 3 C.A.B. 161, 190 (1941). This statement was first made in rejecting the position of the Postmaster General that need mail pay on a system basis should be awarded only for those schedules and routes over which mail was actually transported. See, also, *Delta Air Corp., Mail Rates*, 3 C.A.B. 261, 271 (1942). The same statement has been repeated in

connection with the question of whether separate mail rates should be fixed for the different routes which collectively made up the system rate-making unit. *Eastern A. L., Mail Rates*, 3 C.A.B. 733, 739, 740 (1942); *Pennsylvania Cent. Air, Mail Rates*, 4 C.A.B. 22, 25 (1942).

Pan American's various international divisions are treated by the Board as separate rate-making units. In *Pan American Airways, Inc., Alaska Mail Rates*, 6 C.A.B. 61 (1944), also relied upon by the majority below (R. 72), a final rate was fixed for the Alaska Division. Holding that Pan American was entitled to its costs and a reasonable return on investment allocated to the mail service for the separate Alaska operations irrespective of its over-all system position (6 C.A.B. at p. 68), the Board determined the "service" mail pay to which it believed the carrier to be absolutely entitled. Repeating its statement in the *Chicago and Southern Case* that "need" embraced the need of the air carrier system rather than any particular geographical division (6 C.A.B. at p. 67), the Board determined not to allow subsidy mail pay which otherwise would have been provided because certain "excess earnings" in the Latin-American division were more than adequate to meet the carrier's need (6 C.A.B. at pp. 67 and 78). The same procedure was followed with respect to the carrier's Pacific Division (See 6 C.A.B. at p. 78). However, these "excess earnings" had resulted from payments received under a prior rate between the time of the

institution of a new rate proceeding and the Board's decision therein, and were subject to recapture.²² The Board had determined, upon "economic considerations and considerations of policy," not to recapture these earnings except to the extent that they would be used to offset the carrier's subsequent subsidy need to be determined for other divisions. *Pan Am. Airways, Inc., Latin-American Mail Rates*, 3 C.A.B. 657, 668-70 (1942).

Thus, the actions by the Board upon which the majority relied below related to factual situations clearly distinguishable from the present case. The question of whether international and domestic operations should be treated as separate was not in issue in any of the cited cases. To the extent that the language used in these decisions is contrary to the present position of the Board, it is *dicta*.

There is nothing in any prior action by the Board or in the statute which warrants a denial to the Board of the ordinary rate-making power of establishing separate rate-making units and of fixing separate rates at a level which will sustain the particular unit irrespective of profits or losses which have occurred or may occur in another rate-making

²² Payments under a mail rate are continued after that rate is challenged until such time as a new rate is fixed. The new rate may be made retroactive to the date of the institution of the rate proceeding. *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U. S. 601. Thus, payments during the intervening period which are in excess of those provided by the new rate may be recouped, just as the carrier may be allowed the difference for the intervening period when the new rate is fixed at a higher level.

unit. It goes without saying that this power may be exercised only for valid reasons, and that the validity of any particular classification is subject to judicial scrutiny. It is apparent also that the Board is not bound to follow its present classifications, and may change them as to rates for future periods as circumstances warrant.

We also note our belief that the Board's policy will not result in any likelihood of ultimate greater cost to the government than will occur from an application of the policy advocated by the Postmaster General. Where both divisions are subsidized, control may be maintained as readily on a division basis as on a system basis. Excess profits or substantial losses are just as likely to occur under system rates as under division rates, a fact apparently overlooked by Judge Bazelon in his concurring opinion.²³ We recognize a short-term benefit from the recapture of the profits here involved, and from the application of domestic profits under service rates to the support of international operations. Apart from questions of legal power to make these offsets, we believe that, under present conditions, the ultimate resulting cost and impairment to the development of the air transportation system, would far outweigh these short-term benefits (See *supra*, pp. 20-30).

²³ Air carrier revenues are subject to the same fluctuations as the revenues of other businesses, and a reasonable and representative period of time must elapse before it can be determined whether any rate, system or division, will prove either excessive or insufficient.

B. The Civil Aeronautics Act confers discretionary authority upon the Board to decline in appropriate cases, for reasons of regulatory policy, to reduce mail pay allowances through the application of certain categories of "other revenue"

If the Board may not regard the rate-making units as separate air carriers for mail pay purposes in appropriate cases, it still does not follow that revenues derived from domestic operations mandatorily must be used to reduce mail pay for international operations. Rather, we believe that Section 406 plainly confers discretionary authority in the Board to refuse to reduce mail pay allowances otherwise "fair and reasonable" through the application of certain categories of "other revenue" when that refusal is predicated upon sound reasons of regulatory policy.

Under the Postmaster General's view, a "need" mail rate must be limited to the level which will provide the minimum supplemental amount necessary to enable a carrier to maintain an existing or projected total operation and to obtain a stated fair rate of return on over-all investment. We think this concept of "need", accepted by the Court of Appeals in this case and rejected in the companion case involving Western, to be erroneous.²⁴ "Need"

²⁴ In the case involving Western, the Court of Appeals recognized that "[t]he statute says that the carrier should receive the amount needed not only to insure the performance of the service but also to enable it to continue the development of air transportation." *Summerfield et al. v. Civil Aeronautics Board*, Nos. 11259, 11324; p. 344 of the record in this Court in Cases 224 and 225.

means much more than the private revenue need of a carrier for supplemental income to sustain its operations. It embraces the public need for a sound and adequate air transportation system as well. The statute is "affirmative in its prescription," as Judge Prettyman pointed out (R. 76). It speaks in terms of enabling the carrier to "maintain and continue the development of air transportation," and not in terms of merely enabling the carrier to maintain an existing operation. "Need" is not described "as the remainder after all other revenue is deducted," nor does the statute speak of "offsets or deductions" (R. 76).

On the contrary, the "other revenue" of the carrier is simply a factor which the Board "shall take into consideration" in determining the amount of mail pay necessary for the furtherance of the statutory goal of developing a sound and adequate air transportation system. The phrase "take into consideration" is not equivalent to a command to offset all other revenue. It means merely what it says, that other revenues are to be considered in determining the mail pay allowance. The weight to be given to this factor is left to the sound judgment of the Board. See *e.g.*, *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 611, 612; *New York v. United States*, 331 U.S. 284, 345-349; *United States v. Interstate Commerce Commission*, 66 U.S. App. D.C. 398, 88 F. 2d 780, *cert den.*, 300 U.S. 684.

There are circumstances in which the development of air transportation requires the exclusion of certain types of "other revenue" in computing

individual mail pay allowances. One such circumstance is illustrated by the present case, where domestic earnings must be excluded from use in reducing international mail pay allowances so that the carriers will have an incentive both for conducting efficient domestic operations and for vigorously promoting and developing international services. To the extent that a refusal to reduce the international mail pay allowance by domestic profits may be regarded as equivalent to an increase in an otherwise "fair and reasonable" international rate, the carriers "need" the additional compensation so that they will act for the "development of air transportation." C. & S. had "need" for the domestic profits earned under its final domestic rate in that it otherwise would not have had the incentive for efficient domestic operations. The public "need" for a sound and adequate air transportation system also was served through the Board's refusal to make the offset. The "need" of the carrier and the public were coextensive.

Thus, the Board's finding that the particular category of "other revenue" should be excluded fulfills the requirement insisted on by the Postmaster General that there be a finding of need on the part of the carrier for the mail compensation granted. Actually, however, the only finding required by the Act is the finding that the rate fixed is "fair and reasonable" in the light of all of the factors to be considered. The Board considered all required factors, including "all other revenue" and the over-all purposes of the Act embodied in Sections 2 and 406. It found the international rate to be "fair and rea-

sonable" (R. 58). The statute required no more.

The Board has never considered "that a predetermined rate of return upon the so-called 'fair value' of the carrier's property is the measure of reasonableness" in fixing mail rates. *American Air, Mail Rates*, 3 C.A.B. 323, 337 (1942).²⁵ Rather, the Board consistently has considered that the "use of the mail payments is a statutory device for the accomplishment of national objectives . . ." *Ibid*, 3 C.A.B. at p. 335. It has used mail pay as the developmental tool for which it was intended, even though a particular carrier might obtain a private benefit which it was not entitled to demand.

²⁵ Neither, may we add, is a predetermined rate of return the absolutely controlling factor in fixing other types of utility and carrier rates. Under accepted rate-making principles, a fair and reasonable rate need not be the lowest possible rate. See e.g., *Federal Power Commission v. Natural Gas Pipe Line Co.*, 315 U. S. 575; *Denver Stock Yard Co. v. United States*, 304 U. S. 470, 483; *Banton v. Belt Line Ry.*, 268 U. S. 413, 422, 423. It is well recognized that a higher rate of return may be provided for incentive purposes. See e.g., *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U. S. 276, 291 (dissenting opinion by Mr. Justice Brandeis); *Idaho Power Co. v. Thompson*, 19 F. 2d 547, 561 (S.D. Idaho); *Petition of Public Service Coordinated Transport*, 5 N.J. 196, 74 A. 2d 580, 595. Indeed, this fact was recognized by the Court of Appeals in the companion case to this, wherein the Court stated that "[a]llowances designed as developmental incentives for the utility whose rates are being determined are quite common in public utility rate-making." *Summerfield et al. v. Civil Aeronautics Board*, p. 350 of record in Cases 224 and 225.

It is also well recognized that ordinary rate-making powers may be used for the purpose of accomplishing over-all statutory objectives and for meeting public needs. *King v. United States*, 344 U. S. 254, 263, 264; *Baltimore & Ohio Railroad Co. v. United States*, 345 U. S. 146, 150; *New York v. United States*, 331 U. S. 284, 345-349. The rate of return received by an individual carrier becomes even less significant in ordinary rate-making in cases in which public interests are

It has long employed "sliding-scale" need mail rates which have the effect of yielding a higher return on investment with increasing load factors or decreasing costs, thereby encouraging and rewarding carriers for efficient promotional activity and efficient operations. It has employed class service rates under which varying rates of return are realized by the carriers within the class according to their ability to control and reduce costs. It has refused to require carriers to refund need mail payments which were subject to recapture because the refunding of those payments would impede the progress of the carrier toward the goal of economic self-sufficiency. *Pan American-Grace Airways, Mail Rates*, 3 C.A.B. 550, 564 (1942); *Pan Am. Airways, Inc., Latin American Mail Rates*, 3 C.A.B. 657, 668 (1942); *American Airlines, Mail Rate Proceeding*, 3 C.A.B. 770, 776 (1942). Since the entry of domestic carriers into the international field, it consistently has treated the domestic and international divisions as entirely separate where classified as separate rate-making units. It has refused to offset profits or make up losses between the di-

being served. For example, uniform commercial rates generally are recognized to be necessary so that all units of the transportation system may obtain traffic and thus survive for the public good. The fact that some carriers receive a greater rate of return under such rates than would otherwise be regarded as fair and reasonable has not been regarded as the controlling factor. *E. g., Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456, 484. Rates otherwise reasonable also may be raised where that action is necessary to equalize territorial rate structures and to prevent undue advantage to different sections of the Nation's economy contrary to the public interest. *New York v. United States*, 331 U. S. 284.

visions because that action would be inimical to the overriding statutory objective of developing a sound and adequate air transportation system.

This is the "established construction of the Act by the Board which should be given weight" (R. 72). The Act could hardly be construed otherwise, in our opinion. The entire purpose and focus of need payments are not simply to make a carrier financially whole in the usual sense, but to develop an air transportation system to serve paramount national interests. If that objective is to be accomplished, Section 406 cannot be administered in the manner of a public relief law. Neither its terms nor its purposes permit the construction advocated by the Postmaster General.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,²⁶ are as follows:

DECLARATION OF POLICY

SEC. 2. In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-trans-

²⁶ Act of June 23, 1938, c. 601, 52 Stat. 973; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401, et seq.

portation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety, and

(f) The encouragement and development of civil aeronautics.

GENERAL POWERS AND DUTIES OF THE [BOARD] General Powers

SEC. 205 (a) The [Board] is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act.

RATES FOR TRANSPORTATION OF MAIL AUTHORITY TO FIX RATES

SEC. 406 (a) The [Board] is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation

is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

RATE-MAKING ELEMENTS

(b) In fixing and determining fair and reasonable rates of compensation under this section, the [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or

pursuant to law ; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

* * * * *

CLASSIFICATION AND EXEMPTION OF CARRIERS CLASSIFICATION

SEC. 416 (a) The [Board] may from time to time establish such just and reasonable classifications or groups of air carriers for the purposes of this title as the nature of the services performed by such air carriers shall require; and such just and reasonable rules, and regulations, pursuant to and consistent with the provisions of this title, to be observed by each such class or group, as the [Board] finds necessary in the public interest.

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 222

CIVIL AERONAUTICS BOARD, PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF
THE UNITED STATES AND THE UNITED STATES OF
AMERICA, ON BEHALF OF THE POSTMASTER
GENERAL

No. 223

DELTA AIR LINES, INC., PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF
THE UNITED STATES AND THE UNITED STATES OF
AMERICA, ON BEHALF OF THE POSTMASTER
GENERAL

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DIS-
TRICT OF COLUMBIA CIRCUIT*

**MEMORANDUM FOR THE POSTMASTER GENERAL AND
THE UNITED STATES OF AMERICA**

These petitions present the question whether
Section 406 (b) of the Civil Aeronautics Act of

1938, 52 Stat. 998, 49 U.S.C. 486, requires the Civil Aeronautics Board, in fixing past subsidy mail pay for the international division of an air carrier, to offset the carrier's excess subsidy earnings from its domestic operations.¹ The Board previously had fixed a final prospective domestic subsidy rate which it estimated would give the carrier a 7.4 percent return on its investment allocable to domestic flights. Actual operating results, however, produced a 12.51 percent return on domestic operations for the period in question, or \$654,000 more than a 7.4 percent would have given. In subsequently fixing the carrier's subsidy for its international operations for the same period, the Board refused to offset the \$654,000—which it characterized as “excess earnings”. (R. 21, 53.) The Board held that Section 406 (b) did not require it to reduce a carrier's subsidy need “with any part” of its other revenue if there were “sound reasons for not doing so as a matter of economic policy” (R. 54).

On the Postmaster General's petition to review, the court of appeals set aside the Board's order. The court, Judge Prettyman dissenting, held that the Board's failure to offset the excess earnings violated the “plain meaning” of the Act (R. 71).

¹ Section 406(b) directs the Board, in determining a carrier's subsidy need, to “take into consideration * * * the *need of each such air carrier* for compensation * * * sufficient * * * together with all *other revenue of the air carrier*, to enable *such air carrier* * * * to maintain and continue the development * * *” of a national air transportation system [emphasis added].

The court stated that the need to be met in awarding subsidy was that of the "carrier as a whole," and not that of "divisible units conducting separate operations" (*ibid.*); that the total subsidy cannot exceed such overall need (*ibid.*); and that by failing to "take" the excess earnings "into consideration" the Board had allowed the carrier \$654,000 more than its actual need "in disregard of the statutory requirement to keep subsidy allowances within those bounds" (R. 72).

We think that the decision below was correct. However, in view of the importance of the question in the administration of the Act, we do not oppose the petition.² In so doing, however, we do not acquiesce in any of petitioners' contentions. Specifically, we do not concur in the conjectural allegation (Pet. No. 222, 14-16; No. 223, 8-10) that the decision below might result in a number of domestic carriers withdrawing from international operations. Moreover, both petitions treat the Board proceeding as if it involved traditional rate-making, rather than the fixing of a Government subsidy. Thus, petitioners argue (Pet. No. 222, 9-10, 16; No. 223, 11, 14-15) that the decision below curtails the normal authority of rate-making bodies to classify different operating divisions as separate rate-making units. However, this power to classify

² We wish to point, however, that pursuant to Reorganization Plan No. 10 of 1953, 18 Fed. Reg. 4543, subsidy payments for services rendered after October 1, 1953, will be made by the Board, and not by the Postmaster General. Thereafter, the Postmaster General will make only payments covering compensation for the carriage of mail.

relates to the fixing of rates which a regulated business can charge its customers; it does not authorize separate subsidies for a carrier's different divisions without consideration of over-all need. These and other considerations which, in our view, support the decision below, will be fully developed in our brief on the merits if the petitions are granted.³

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

AUGUST, 1953.

³ We also disagree with petitioner's contention in No. 223 (Pet. 12-14) that the decision below conflicts with *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601.

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CIVIL AERONAUTICS BOARD, PETITIONER

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ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL
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No. 223

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ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL
OF THE UNITED STATES, AND THE UNITED STATES
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GENERAL

*ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT*

**BRIEF FOR THE POSTMASTER GENERAL AND THE
UNITED STATES OF AMERICA**

OPINIONS BELOW

The opinion of the United States Court of Appeals
for the District of Columbia Circuit (R. 68-76) is

(1)

reported in 207 F. 2d 207. The opinions of the Civil Aeronautics Board (R. 6-60) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1953 (R. 77). The petitions for writs of certiorari were filed on July 31, 1953, and were granted on October 12, 1953 (R. 79-80). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In 1948 the Civil Aeronautics Board fixed a prospective subsidy domestic mail pay rate for an air carrier conducting both domestic and foreign operations, which it estimated would yield the carrier a net return after taxes of 7.4% on that portion of its property allocable to domestic operations. Actual operations under that rate resulted in an average return on such property for the years 1948 through 1950 of 12.51%, or \$654,000 more than a 7.4% rate of return would have produced. In 1951 the Board, in fixing the mail pay subsidy for those years for the carrier's international operations, refused to offset the \$654,000. Section 406 (b) of the Civil Aeronautics Act directs the Board, in fixing mail pay subsidy, to "take into consideration * * * the need of each such air carrier for compensation * * * sufficient * * *, together with all other revenue of the air carrier, to enable such air carrier * * * to maintain and continue the development * * *" of a national air transportation system. The questions presented are:

1. Whether Section 406 (b) of the Act empowers the Board to award a subsidy in the form of "need" mail pay which exceeds the carrier's actual "need."

2. Whether Section 406 (b) authorizes the Board to award "need" mail pay subsidy on the basis of the needs of particular operating divisions of a carrier without regard to the need of the carrier as a whole.

3. Whether Section 406 (b) requires the Board, in determining a carrier's need for subsidy, to offset "all other revenue of the air carrier," or whether the Board may, in its discretion, offset only a part of such other revenue.

STATUTE INVOLVED

The Civil Aeronautics Act of 1938, 52 Stat. 977, as amended, 49 U. S. C. 401 *et seq.*, provides in pertinent part as follows:

Section 1 (2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation * * *. [49 U. S. C. 401 (2).]

Section 1 (13) "Citizen of the United States" means (a) an individual who is a citizen of the United States or one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States * * *. [49 U. S. C. 401 (13).]

Section 401 (k) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the [Board], unless * * * the [Board] shall find such abandonment to be in the public interest. * * * [49 U. S. C. 481 (k).]

Section 406 (a) The [Board] * * * is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, * * * to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, * * * and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft. [49 U. S. C. 486 (a).]

Section 406 (b) In fixing and determining fair and reasonable rates of compensation under this section, the [Board] * * *, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the [Board] * * * shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier

for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense. [49 U. S. C. 486 (b).]

Section 1001. The [Board] may conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. * * * [49 U. S. C. 641.]

Section 1002 (d) Whenever * * * the [Board] shall be of the opinion that any individual or joint rate, fair, or charge * * * or the value of service thereunder, is or will be unjust and unreasonable * * *, the [Board] shall determine and prescribe the lawful rate, fare, or charge * * *. [49 U. S. C. 642 (d).]

STATEMENT

Petitioner Delta Air Lines is the successor by merger to Chicago and Southern Air Lines ("C & S"), a certificated air carrier which conducted both domestic and Latin-American operations prior to its absorption by petitioner. This case involves subsidy mail pay covering C & S's Latin-American division for the years 1948 through 1950.

In 1944 and 1945 C & S petitioned the Board to increase its domestic mail pay, and in July, 1948, the Board fixed the final domestic subsidy. *Chicago and*

Southern Air Lines, Mail Rates, 9 C. A. B. 786. The Board fixed a prospective annual subsidy for the period beginning January 1, 1948,¹ which it estimated would yield C & S a net return after taxes of 7.4% on that part of its investment allocable to domestic operations.² *Id.*, at 812; R. 53. For the years 1948 through 1950, however, the carrier's actual profits under that subsidy resulted in an average return of 12.51% on domestic operations (R. 53, 65). This was \$654,000 more than a 7.4% return would have produced (R. 70).

In October, 1946, C & S requested the Board to fix subsidy mail pay for its Latin-American routes (R. 8).³ On October 18, 1951, the Board issued its opinion and order determining final subsidy mail pay for these foreign operations (R. 51).⁴ Rates were fixed retroactively for the period November 1, 1946, to December 15, 1950, and prospectively from December 16, 1950 (R. 59). Subsidy was awarded

¹ The subsidy which the Board fixed for the past period January 1, 1946, through December 31, 1947, is not involved in this case.

² The Board used a sliding scale rate formula under which the rate of return rose as the passenger load factor increased. The estimated return of 7.4% was based on the carrier's own estimated load factor of 60.09%. 9 C. A. B. 805, 812.

³ C & S was certificated for its Latin-American routes in May 1946. *Latin American Air Service*, 6 C. A. B. 857, 927. Service was inaugurated over these routes November 1, 1946 (R. 8).

⁴ In 1947 and 1948 the Board awarded temporary subsidy mail pay for the Latin-American operations. *Chicago and Southern Air Lines, Latin-American Mail Rates*, 7 C. A. B. 985; 9 C. A. B. 924.

in an amount designed to give the carrier a return after taxes of 7% for the past period (R. 23) and 10% for the future (R. 30) on its property allocable to foreign operations.⁵

In fixing foreign subsidy for the past period, the Board refused to offset the carrier's \$654,000 "excess" earnings on its domestic operations against its "need" resulting from international flights (R. 53-54). In so doing, the Board reaffirmed and applied the principle it previously had enunciated in the contemporaneous *Western Air Lines* case⁶—that Section 406 (b) of the Civil Aeronautics Act does not require it to reduce a carrier's mail pay by any part of its other revenue "if there are sound reasons for not doing so as a matter of economic policy." The Board stated that if profits from domestic operations were used to "sustain" international flights, the "more robust" domestic segment of the industry would be burdened with the obligations of the "economically weaker" foreign part and subjected to an "unjustifiable strain"; that if the domestic segment were kept "financially sound," the public must ultimately benefit through lower fares, reduced mail compensation, more modern aircraft and im-

⁵ The board awarded C & S total subsidy mail pay of \$3,662,000 for its past foreign operations (R. 59). This was based on the carrier's adjusted break-even need of \$3,122,000 (R. 19), a \$393,000 return for the years involved (7%) on recognized international investment of \$1,360,000 (R. 23), and a \$147,000 allowance for Federal income taxes (R. 57).

⁶ The validity of the Board's order fixing subsidy pay in that case is before this Court in Nos. 224 and 225, this Term, which have been consolidated for argument with these cases.

proved operating methods; and that it was "desirable" to maintain the "comparative status" between domestic operators with and those without foreign routes, in order to permit the Board to continue using the comparison technique for fixing class rates for domestic carriers (R. 54-55). The Board emphasized that its refusal to make the offset stemmed from "considerations of economic policy," and that it was not deciding whether it had the power to do so (R. 55; see R. 21).

On the Postmaster General's petition for review,⁷ the Court of Appeals held that the Board had erred in refusing to offset C & S's excess domestic earnings. The court stated that the "plain meaning" of Section 406 (b) is that the need to be met in awarding subsidy is that of the "carrier as a whole," and not that of "divisible units conducting separate opera-

⁷ At the time the petition for review was filed, the Postmaster General was required to pay air carriers for transporting air mail, out of funds appropriated by Congress for that purpose, at the rates fixed by the Board. Section 406 (a). He participated in all air mail pay proceedings before the Board, and served as the protector of the public interest in such proceedings. *Seaboard & Western Air Lines v. Civil Aeronautics Board*, 181 F. 2d 515, 518-519 (C. A. D. C.), certiorari denied, 339 U. S. 963. The Postmaster General thus had a substantial interest in the order under review within the meaning of Section 1006 of the Act. *Summerfield v. Civil Aeronautics Board*, 207 F. 2d 200, 203, Nos. 224 and 225, this Term; cf. *Far East Conference v. United States*, 342 U. S. 570, 576.

Pursuant to Reorganization Plan No. 10 of 1953, 18 Fed. Reg. 4543, subsidy payments for services rendered after October 1, 1953, will be made by the Board, and not by the Postmaster General. The latter will make only payments covering compensation for carrying the mail.

tions" (R. 71); that in determining C & S's "need" on its Latin-American routes, the Board was required to consider all of the carrier's other revenue (R. 71-72); and that, since the excess domestic profit of \$654,000 admittedly was part of such revenue, the Board's refusal to "take" the item "into consideration" "results in allowing the carrier \$654,000 more than its actual need, in disregard of the statutory requirement to keep subsidy allowances within those bounds" (R. 72).⁸

SUMMARY OF ARGUMENT

I

Section 406 (b) of the Civil Aeronautics Act provides that, in fixing fair and reasonable compensation for the transportation of mail by aircraft, the Civil Aeronautics Board "shall take into consideration," *inter alia*, the need of each air carrier for compensation sufficient (1) to insure the transportation of mail, and (2) to enable the carrier to maintain and continue the development of an efficient national air transportation system. In fixing mail pay, the Board recognizes this distinction. Economically

⁸ Judge Prettyman, dissenting, stated that the Act authorizes the Board to fix different rates for international and domestic service (R. 75); that the Act contemplates that the Board, in fixing an international rate, will determine the amount needed by the carrier for its international operations (R. 76); and that, in determining "a separate rate for a separate type of mail service," the other revenue which the Board must consider "means revenue related to that service for which the rate is being fixed" (*ibid.*).

self-sufficient carriers are paid a "service" rate which constitutes fair compensation for carrying the mail, and supposedly contains no subsidy. Carriers not operating profitably, however, are paid a "need" rate which bears no relation to carrying the mail, but is an outright subsidy which guarantees them a return after taxes of at least 7 percent on their invested capital. The instant case deals solely with "need," *i. e.*, subsidy, mail pay.

Although this need is only one factor which the Act requires the Board to consider in awarding subsidy, it plainly is a limiting one, *i. e.*, the total subsidy cannot exceed the carrier's need. The Board cannot disregard the "carefully worded 'need' formula which the Act sets for the Board's guidance" in fixing subsidy mail pay, *American Airlines, Mail Rates*, 3 C. A. B. 323, 335, by determining and "considering" such need, and then awarding a subsidy in excess thereof.

The Board did not find that the carrier "needed" an additional \$654,000 for its past international operations; it merely refused to offset this excess profit "as a matter of economic policy." In so doing, however, the Board awarded the carrier a subsidy in excess of its actual need. The developmental objectives of the Act do not authorize the Board to ignore the statutory limitation that total subsidy cannot exceed need.

II

As the Board consistently had recognized, the need to be met by subsidy is that of the carrier as a whole,

and not that of particular operating divisions. *E. g., Pan American Airways, Alaska Mail Rates*, 6 C. A. B. 61. The Board's authority to "fix different rates for different air carriers or classes of air carriers, and different classes of service" does not modify the limitation in the Act that subsidy cannot exceed "the need of * * * [the] air carrier [as a whole]," and does not authorize the Board to treat a carrier's international division as a separate carrier for subsidy purposes. If the carrier's international and domestic subsidies had been fixed in a single proceeding, plainly the need would have been that of the carrier as a whole. The amount of subsidy which a carrier needs, however, does not depend upon whether the Board fixes international and domestic mail pay in separate proceedings, or in a single one. Indeed, the Board's construction of the Act would permit it to award subsidy for unprofitable divisions of a domestic carrier even though the carrier's overall operation was profitable.

The Board's reliance on the traditional authority of rate making bodies to establish appropriate rate making units and to fix separate rates therefor overlooks the fact that in traditional rate proceedings the issue is whether the utility has received fair compensation, whereas in mail pay subsidy cases the issue is the carrier's need. The Board has power, as a procedural matter, to determine mail pay for international and domestic operations in separate proceedings. But by conducting such separate pro-

ceedings the Board cannot award total subsidy in excess of the need of the carrier as a whole.

III

1. Section 406 (b) of the Act defines a carrier's subsidy need as an amount which, "together with all other revenue of the air carrier," will enable the carrier to meet the statutory objectives. The Act thus requires the Board to offset *all* of a carrier's other revenue in awarding subsidy, and gives it no discretion to disregard any portion of such other revenue because of economic policy considerations. The term "all other revenue" does not mean "all or some part of other revenue." A carrier's need for subsidy is reduced to the extent that it has other revenue; allowing the Board to disregard any portion of such revenue would give the carrier a subsidy in excess of its need. The Board does not comply with the Act merely by "considering" such other revenue and then, having considered it, disregarding a part of it.

2. There is no issue here of "recapturing" any portion of the carrier's domestic earnings, or of revising its closed domestic rate. Obviously, a subsidy system does not take anything away from a carrier. The sole issue here is how much more subsidy the carrier is to receive for its international operations in addition to the substantial domestic subsidy it already has received for the same period.

Transcontinental & Western Air, Inc. v. Civil Aeronautics Board, 336 U. S. 601, is not in point.

The *TWA* case held only that the Board has no power under Section 406 (a) of the Act retroactively to revise a closed domestic *service* rate for the period prior to the filing of a petition to fix a new rate. This Court did not decide any of the broader issues as to subsidy under Section 406 (b) which the instant cases present, and to which different policy considerations are applicable.

3. Petitioners' economic arguments designed to show the allegedly harmful effects of compulsory offsetting upon the airline industry are all beside the point, since the Board has no discretion under the Civil Aeronautics Act to disregard any portion of a carrier's other revenue. In any event, they are unpersuasive. The claim that compulsory offsetting might lead domestic carriers to withdraw from international operations is wholly conjectural, and is based on assumptions that contravene normal economic behavior. The carriers have adequate incentives to operate efficiently, and their financial stability would not be threatened by offsetting domestic subsidy earnings in excess of their needs.

ARGUMENT

INTRODUCTION

At the outset, we think it important to place these cases in their proper perspective. Although petitioners treat them as involving traditional rate-making, the fact is that, in any realistic sense, these are not rate proceedings at all. Rate making involves the fixing of the maximum amounts which

a public utility in a noncompetitive business can charge its customers for services, and is designed to protect the consuming public against overcharges which might otherwise result, while at the same time insuring the utility a fair rate of return. The so-called rate making by the Board in this case, however, is nothing more or less than the awarding of subsidies which Congress has determined the airlines should receive from the public treasury⁹ in order to permit the development of an efficient national air transportation system. Although Congress has provided that the amount of such subsidies is to be determined through the mechanism of fixing

⁹ The Board has estimated that \$270,000,000 of the \$457,000,000 total mail pay which domestic carriers received during the fiscal years 1938 (when the Act was passed) through 1951, or almost 60%, represented subsidy. Civil Aeronautics Board, *Administrative Separation of Subsidy from Total Mail Payments to Domestic Air Carriers*, September 1951, p. 5. During the same period, mail payments to international carriers—whose percentage of subsidy, although not specified, was “substantially greater” than that of domestic carriers—totalled \$330,194,000. Civil Aeronautics Board, *Administrative Separation of Subsidy from Total Mail Payments to United States International Overseas and Territorial Air Carriers*, June 1952, p. 3, Appendix D. For the fiscal years 1952 through 1955, the Board has estimated that all American carriers, both domestic and international, will receive total mail pay of \$527,195,000, of which \$307,174,000, or approximately 58%, will represent subsidy. Civil Aeronautics Board, *Administrative Separation of Subsidy from Total Mail Payments to United States Air Carriers*, September 1953 Revision, p. 1. Thus, total subsidy payments to American air carriers during the first 18 years of the Civil Aeronautics Act are expected to exceed three quarters of a billion dollars.

fair and reasonable mail pay rates—a concept apparently borrowed from traditional rate-making statutes—“‘[r]ate’ as applied to the Government’s air-mail payments is an euphemism to embrace a subsidy as well as compensation.” Mr. Justice Jackson, dissenting, in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U. S. 601, 608. It is fundamental to a proper understanding of the issue in these cases that it be made clear that the “rates” involved are subsidy payments, and bear no relation to just compensation for carrying the mail.

Two other points are significant. First, contrary to petitioners’ contention, there is no real issue in this case as to “recapture” of any portion of C & S’s earnings. Obviously, a subsidy system is not one which takes away anything. The sole question here is how much subsidy C & S is to receive for its international operations for the years 1948 through 1950 *in addition to* the very substantial subsidy which it already has received for domestic operations during the same period.¹⁰ Second, this case relates only to the treatment of *excess* domestic profits—*i. e.*, those in excess of 7.4%—which have accrued under prior subsidy payments. The fact is that the carrier here is complaining because its subsidy from the public

¹⁰ C & S reported that it received total domestic mail pay of \$5,439,692 during those years. Application of the 53 cents per ton mile service rate which the Board applied to C & S in its Administrative Separation would indicate that approximately \$4,500,000 of this amount, or 83%, represented subsidy. The supporting data for these calculations are set forth in the Appendix, *infra*, p. 47.

treasury is limited to an amount which gives it an overall return after taxes of 7.3% on its invested capital (Pet. Board's Br., p. 6, n. 2).

1.

**SUBSIDIES IN THE FORM OF MAIL PAY CANNOT EXCEED
THE "NEED" OF THE CARRIER**

Section 406 (a) of the Civil Aeronautics Act (*supra*, p. 4) directs the Civil Aeronautics Board to fix "fair and reasonable" rates of compensation for the transportation of mail by aircraft. Section 406 (b) (*supra*, pp. 4-5) provides that, in determining such rates, the Board "shall take into consideration," *inter alia*,

* * * the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, *together with all other revenue of the air carrier*, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense. [Emphasis added.]

The Act thus distinguishes between a carrier's respective need for compensation sufficient (1) to insure the transportation of mail, and (2) to enable the carrier to promote the development of an efficient national air transportation system.

The Board has recognized this distinction in fixing mail pay. Mail payments are calculated either on what the Board describes as a "service" basis, or on what it calls a "need" basis. If the carrier is economi-

cally self-sufficient, it is paid a so-called "service rate," which is designed to give it fair compensation for carrying the mail, and supposedly contains no subsidy elements.¹¹ This rate is based on the number of mail miles flown, either actually or prospectively. Illustrative of such rates is the 45 cents per ton mile currently being paid to the "big four" domestic airlines (American, Eastern, T. W. A., and United).

If, however, the carrier is not economically self-sufficient, its mail pay then is determined on a "need rate." This is an acknowledged subsidy in an amount designed to maintain the carrier as an efficient going concern, and has no relation to its mail carrying services.¹² "Need" pay is fixed by the Board in an amount sufficient (1) to enable the carrier to meet its operating expenses, (2) to pay its taxes, and (3) to provide a fair rate of return on its

¹¹ *Eastern Air Lines, Mail Rates*, 3 C. A. B. 733, 755, 760 (1942); Burt and Highsaw, *Regulation of Rates in Air Transportation*, 7 La. L. Rev. 1, 378, 387. "Service rate" payments, however, are not limited merely to reimbursement of the carrier's expenses of carrying the mail, but also include a fair profit on the investment allocable to the service. *Eastern Air Lines, supra*, at 755-756.

¹² Indeed, the Board has allocated "need" payments to particular routes on which no mail was carried. *Chicago and Southern Air Lines, Mail Rates*, 3 C. A. B. 161, 190 (1941); *Pennsylvania-Central Airlines, Mail Rates*, 4 C. A. B. 22, 28 (1942).

invested capital.¹³ However, since the Act requires the carrier to operate under "honest, economical, and efficient management," the Board reduces the amount of subsidy need by disallowing excessive or improper expenditures or operations which fail to meet that criterion.¹⁴

The instant case illustrates how such a "need rate" is calculated. The Board first determined that C & S needed \$3,122,000 to break even on its international division (R. 19). In making this calculation, the Board disallowed certain expenditures which were not consistent with "honest, economical, and efficient management." Thus, the Board disallowed expenses incurred on flights which it found had not been justified by the volume of traffic (R. 11-13, 16), and made adjustments to reflect the carrier's exces-

¹³ *Pioneer Air Lines, Mail Rates*, 8 C. A. B. 175, 187 (1947). The Board generally allows a 7% return for past periods on both domestic and international operations (*Western Air Lines, Mail Rates*, Docket No. 2870, Order E-4870, November 24, 1950, mimeographed p. 47; R. 23, 56), although special circumstances sometimes have resulted in other rates. E. g., *Capital Airlines, Mail Rates*, 10 C. A. B. 705, 725 (1949) (only 6% return because of carrier's "top-heavy" debt structure). For future periods, the return generally allowed is 8% for domestic operations (*Chicago and Southern Air Lines, Domestic Operations, Mail Rates*, Docket No. 5144, Order E-5869, November 15, 1951; *Pioneer Air Lines, Mail Rates*, 12 C. A. B. 84) and 10% for foreign operations (R. 30).

¹⁴ For example: failure to reduce schedules following drop in traffic (*Capital Airlines, Mail Rates*, 10 C. A. B. 705, 708-712); excessive salaries (*Pioneer Air Lines, Mail Rates*, 8 C. A. B. 175, 185; *Trans-Texas Airways, Mail Rates*, 12 C. A. B. 101, 110); unnecessarily high maintenance charges (*Northeast Airlines, Mail Rates*, 9 C. A. B. 291, 296-304).

sive depreciation charges (R. 17).¹⁵ The Board next determined that the carrier's recognized investment for subsidy purposes—again after making certain adjustments (R. 22-23)—was \$1,360,000, on which it allowed a 7% return, or \$393,000 for the years involved (R. 23). To this was added a \$147,000 allowance for Federal income taxes (R. 57), giving total subsidy mail pay for the period of \$3,662,000 (R. 59).¹⁶ It should be noted that none of these calculations was based upon or even considered the amount of mail which C & S carried.

The so-called "need rate" is thus nothing more or less than the "statutory device"¹⁷ whereby the Government, for reasons of national policy, gives the air carriers an outright subsidy which guarantees them at least a 7% return after taxes on their recognized invested capital.

As the Board itself has recognized, "Section 406 (b) of the Act * * * requires that mail pay shall be awarded *in an amount corresponding to the statutory 'need' for such compensation as a means of maintaining and continuing the development of air*

¹⁵ The Board's refusal to offset the excess domestic earnings occurred in calculating this break-even need.

¹⁶ Application of the 88 cents per ton service rate which the Board used in its Administrative Separation for C & S's international division to the 54,000 U. S. mail ton miles actually flown on this operation from November 1, 1946, to December 15, 1950 (R. 35), would indicate that only \$47,000 of the total mail pay awarded was compensatory, and the balance of \$3,615,000, or more than 98%, constituted subsidy.

¹⁷ *American Airlines, Mail Rates*, 3 C. A. B. 323, 335.

transportation in the public interest * * *.”¹⁸ Although need is not the only factor which the Board must consider, it plainly is a limiting one, *i. e.*, the Board cannot award subsidy in excess of what the carrier needs. The statutory mandate that the Board “shall take into consideration” the carrier’s need¹⁹ cannot be construed to authorize the Board to disregard the need limitation in awarding subsidy. At most, it authorizes the Board to determine that a carrier’s financial condition is such that it has no need for subsidy—as the Board does whenever it fixes mail pay on a service rate. Cf. *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U. S. 604, discussed *infra*, pp. 35–36. The “carefully worded ‘need’ formula which the Act sets for the Board’s guidance in fixing the air mail ‘compensation’”, *American Airlines, Mail Rates*, 3 C. A. B. 323, 335, cannot be read to permit the Board to disregard this standard by determining and “considering” such need and then awarding a subsidy in excess thereof. When Congress directed the Board to “take into consideration” the carrier’s need, it

¹⁸ *Western Air Lines, Mail Rates*, Docket No. 5148, Order No. E-6295, April 7, 1952, at mimeographed p. 11, emphasis added. Accord: *American Airlines, Mail Rates*, 3 C. A. B. 323, 335–338 (1942); *Pan American Airways, Alaska Mail Rates*, 6 C. A. B. 61, 67 (1944); *Pan American Airways, Latin-American Mail Rates*, 6 C. A. B. 85, 91 (1944); *Pan American Airways, Trans-Pacific Mail Rates*, Docket No. 2147, Order No. E-5882 (November 21, 1951, mimeographed p. 21).

¹⁹ We discuss *infra*, p. 35, petitioners’ contention that the words “take into consideration” modify the words “all other revenue of the air carrier.”

plainly intended such need to be a ceiling on subsidy payments.

In the instant case, the Board did not find that the carrier "needed" an additional \$654,000 for its past international operations. It merely concluded that those excess domestic profits should not be offset "as a matter of economic policy" (R. 54).²⁰ In so doing, however, the Board gave the carrier a subsidy which clearly exceeds its actual need. Thus, in 1948 the Board found that C & S "needed" subsidy which would produce a 7.4% return on its property allocable to domestic operations. Total subsidy payments, however, resulted in profits of \$654,000 more than a 7.4% return. In other words, it now appears that the Board gave the carrier total domestic subsidy which was \$654,000 more than the carrier actually needed during those years, or an overall return of 11% (Board Br. 6 n. 2).²¹ In such circumstances, the carrier (which, after all, is but one

²⁰ Contrary to the suggestion in the Board's brief (p. 41), this conclusion cannot be deemed equivalent to a finding that C & S needed that much additional subsidy. The Board did not grant the additional subsidy on that theory, nor, for the reasons stated in the text, could it have done so. Moreover, the issue is not whether the Board made a formal finding to that effect, but whether the Board awarded subsidy in excess of the carrier's need. Similarly, there is no merit to the argument (Br. 41-42) that the Section 406 (a) statutory finding that the rate is "fair and reasonable" is sufficient. Under the Act, a rate cannot be found fair and reasonable if the Board has departed from the standards of Section 406 (b) in fixing it.

²¹ But for this subsidy, C & S would have had no excess earnings during those years. See *supra*, p. 15, n. 10.

economic unit) cannot complain if such excess domestic subsidy is applied to reduce any alleged need for subsidy on its international operations during those same years. Indeed, as we demonstrate in Point III, *infra*, the Act requires the Board to offset *all* of this other revenue of the carrier in determining the carrier's total subsidy need.

We are not, as the Board alleges (Br. 39-40), seeking to limit subsidy to the minimum amount required to maintain operations of an air carrier system at their existing level. On the contrary, we fully recognize that the developmental objectives of the Act are one of the factors upon which need is to be calculated. Indeed, the Board gives effect to these objectives by awarding subsidy sufficient to guarantee the carrier a substantial profit, instead of merely covering operating expenses. The different rates of profit allowed for domestic and international operations (*supra*, p. 18, n. 13) similarly reflect the developmental need for a higher return in the more uncertain international field to attract investment capital. But there is no warrant for any assumption that the developmental objectives of the Act authorize the Board to ignore the statutory limitation that total subsidy cannot exceed the carrier's need.

II.

THE "NEED" REFERRED TO IN SECTION 406 (B) IS THE NEED OF THE CARRIER AS A WHOLE, AND THE ACT DOES NOT AUTHORIZE THE BOARD TO AWARD SUBSIDY ON THE BASIS OF THE "NEED" OF PARTICULAR OPERATING DIVISIONS

The Board in the instant case, while recognizing the need standard as the basis for awarding subsidy,

nevertheless concluded that "the earnings from C & S's domestic routes should not be used to offset the 'need' resulting from the carrier's international routes" (R. 55). In thus looking to the need of a single operating division rather than to that of the carrier as a whole as the basis for awarding subsidy, the Board departed from the "plain meaning" of the Act that the need to be met by subsidy pay is that of "a carrier as a single entity," and not that of "divisible units [of the carrier] conducting separate operations" (R. 71).

A. The language of the Act establishes the need of the carrier as a whole as the basis for awarding subsidy

Section 406 (b) clearly specifies that the need to be met in fixing subsidy is that of the carrier as a whole, and not that of particular operating divisions. The "need" clause begins by defining need as that of "each such air carrier."²² The "other revenue" clause²³ similarly speaks of all other revenue "of the air carrier," and then refers to compensation which, together with such other revenue, is sufficient to enable "such air carrier" to carry out the statutory objectives. The Act thus establishes the air carrier itself—and not particular divisions or routes thereof—as the "primary unit around which the national air transportation system was to be developed through the instrumentality of air mail [subsidy] compensa-

²² That clause is: " * * * the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service * * * "

²³ That clause is " * * * together with all other revenue of the air carrier * * * "

tion." *Chicago and Southern Air Lines, Mail Rates*, 3 C. A. B. 161, 190.

Until the decision in the instant case (and in the contemporaneous *Western Air Lines* case), the Board consistently had recognized this principle. In the *Chicago and Southern* case, *supra*, the Board, in deciding that it could award subsidy mail pay to cover routes on which no mail at all was carried, flatly held:

The "need" [referred to in Section 406 (b)] is that of the air carrier as a whole and not that of any particular geographical division of its operations [*Ibid.*].

This view was specifically reasserted in a number of subsequent cases involving subsidy mail pay for both domestic and international operations. *Delta Air Corporation, Mail Rates*, 3 C. A. B. 261, 271 (1942) (domestic); *Pan American Airways, Latin-American Mail Rates*, 3 C. A. B. 657, 670 (1942) (international); *Eastern Air Lines, Mail Rates*, 3 C. A. B. 733, 739-740 (1942) (domestic); *Pennsylvania-Central Airlines, Mail Rates*, 4 C. A. B. 22, 28 (1942) (domestic); *Western Air Lines, Mail Rates*, 4 C. A. B. 441, 444 (1943) (domestic); cf. *American Airlines, Mail Rates*, 3 C. A. B. 323, 339 (1942); *Transcontinental & Western Air, Mail Rates*, 4 C. A. B. 139, 143 (1943). And see cases cited *infra*, p. 25, n. 24.

In the *Pan American* case in 1944, the Board reaffirmed this principle in refusing to award additional subsidy for one division because of a carrier's "excess" earnings on another division. *Pan American Airways, Alaska Mail Rates*, 6 C. A. B. 61, 67.

Pan American's operations were conducted through four separate divisions. In fixing subsidy mail pay for the carrier's Alaskan division, the Board first determined the need of that division as a separate entity, and then "considered our findings with respect to respondent's other operating divisions, thereby taking into consideration the 'need' of the respondent as a whole." *Id.* at 65 [emphasis added]. The Board refused to award any additional subsidy to cover the \$1,533,614 which it found the carrier needed on its Alaskan division, because the carrier's "excessive earnings" of \$6,097,751 from its Latin-American operations were "ample" to satisfy this "need". *Id.* at 67.

The Board stated that—

[s]ince the amount of respondent's excess earnings greatly exceeded the requirements of the Alaska division, respondent has no "need" for which it may be paid additional compensation [*ibid.*].²⁴

In attempting to distinguish its prior decisions, the Board states (Br. 35) that it consistently has refused

²⁴ Similarly, the Board refused to award additional subsidy to meet the carrier's "need" of \$1,607,501 on its Pacific division because of the excess earnings on the Latin-American division. *Pan American Airways, Alaska Mail Rates*, 6 C. A. B. 61, 78. The Board again reaffirmed the view that the need to be met is that of the carrier as a whole, and not that of particular operating divisions, in fixing Pan American's subsidy pay for 1945. *Pan American Airways, Alaska Mail Rates*, 8 C. A. B. 244, 257 (1947); *Pan American Airways, Transatlantic Mail Rates*, 8 C. A. B. 267, 288-289 (1947); *Pan American Airways, Latin-American and Miami-Leopoldville Mail Rates*, 8 C. A. B. 876, 882 (1947).

to offset profits or make up losses from final division rates. This contention, however, relates to the Board's statutory duty to offset *all* of the carrier's other revenue in determining need (see discussion Point III, *infra*, pp. 30-³47). It does not contravene the fact that, prior to the instant case, the Board always had viewed the need to be met in awarding subsidy as that of the carrier as a whole.

B. The Act does not authorize the Board to treat C & S's international division as a separate carrier for mail pay purposes

Petitioners argue, however, that the first sentence of Section 406 (b) authorizes the Board to treat C & S's international division as a separate air carrier in determining subsidy need. That sentence provides that in fixing mail pay the Board "may fix different rates for different air carriers or classes of air carriers, and different classes of service." While that provision authorizes the Board to allow different rates of return for the carrier's two divisions, it does not modify the limitation in the second sentence of Section 406 (b) that subsidy is to be awarded to meet "the need of * * * [the] air carrier [as a whole]." Indeed, as Section 1 of the Act makes clear, "air carrier" means the corporate entity, not particular subdivisions thereof. For Section 1 (2) defines "air carrier" as "any citizen of the United States who undertakes * * * to engage in air transportation * * *," and Section 1 (13) in turn limits "citizen of the United States" to (a) an individual, (b) a partnership, or (c) a corporation or association.

As we have noted, it is the second sentence of Section 406 (b) which sets forth the substantive criteria to be applied by the Board in fixing subsidy, including the over-all limitation to the need of the carrier as a whole, and the method of calculating such need. The first sentence of 406 (b) does not alter these standards, but merely makes it clear that, in determining such need, the Board is not required to fix the same rate for all carriers, but has discretion to fix different rates for different carriers or classes of service, as the "conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers" may require. Thus the Board is authorized to—and does—fix different rates for international and domestic carriers,²⁵ and for various classes of carriers within each of these categories.²⁶ But in thus fixing rates separately, the Board cannot ignore the requirement in the second sentence of 406 (b) that total *subsidy* cannot exceed the need of the *carrier as a whole*. A particular division does not become a separate "air carrier" for subsidy purposes merely because the Board, as a procedural matter,

²⁵ The Board fixes subsidy for international carriers on a basis designed to provide a higher rate of return than for domestic carriers—apparently reflecting the greater uncertainties in international operations and the correspondingly higher return necessary to attract investment capital. See *supra*, p. 18, n. 13.

²⁶ In its Administrative Separation the Board has divided domestic carriers into seven categories, whose service rates range from \$0.45 per ton mile for the "big four" to \$7.26 per ton mile for the smallest carriers. International carriers similarly have been grouped into six categories with varying service rates.

elects to fix its subsidy in a separate administrative proceeding.

If the Board had fixed C & S's subsidy on its domestic and international operations simultaneously in a single proceeding, there could be no doubt that the air carrier whose subsidy need was to be met would be the carrier as a whole, and that in ascertaining such need the Board would look to the carrier's total revenues. The amount of subsidy which a carrier needs, however, does not depend upon whether the Board fixes mail pay separately for domestic and international operations, or jointly in a single proceeding. The "need of * * * [the] air carrier" is the same in either case.

Indeed, the Board's construction of the Act would allow it to go even further, and to award subsidy separately to particular divisions of a domestic carrier without regard to that carrier's over-all financial position. Thus, a domestic carrier with three operating divisions, two of which were extremely profitable but one of which was not, could call upon the Board to make up losses on the latter division even though its over-all operation was successful. Under the Board's theory, all that would be required to justify such a bounty would be a reasonable basis for employing a separate proceeding for fixing subsidy for the unprofitable division.

There is no inconsistency in permitting the Board to conduct separate administrative proceedings to fix a carrier's domestic and international subsidy,

and at the same time limiting the total subsidy awarded in both proceedings to the need of the carrier as a whole. Cf. *B. & O. R. Co. v. United States*, 345 U. S. 146. That was precisely what was done in the *Pan American* cases (discussed *supra*, pp. 24-25), where the Board determined separately the subsidy need of one operating division of a carrier, but refused to award additional subsidy to meet that need because of the carrier's excess earnings on another division. Indeed, if Pan American's four unconnected divisions are not separate carriers for subsidy purposes—as the Board repeatedly has held—C & S's two interconnected divisions have even less claim to be so treated.

We do not challenge the Board's power, as a procedural matter, to determine mail pay for international and domestic operations in separate proceedings.²⁷ Our point is that this practice cannot be used to circumvent the statutory limitation that total subsidy cannot exceed the need of the carrier as a whole.

The Board's contention (Br. 38) that the decision below denies it the traditional authority of rate-making bodies to establish separate rate-making units and to set rates at a level which will sustain the particular unit confuses the issues in rate making with

²⁷ The Board's power to do so does not necessarily depend upon the first sentence of Section 406 (b). Section 1001 authorizes the Board to "conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice."

those in the awarding of subsidy.²⁸ In traditional rate proceedings, the issue is whether the maximum charges to customers which the regulatory agency has fixed for a public utility meet the constitutional standards of due process and just compensation. Cf. *B. & O. R. Co. v. United States*, *supra*. In the case at bar, however, there is no such issue, since by definition the carrier is receiving a subsidy which bears no relation to the mail transportation services performed for the Government. The cases dealing with a rate-making agency's discretion to select an appropriate rate-making unit are relevant only to show that the Board can fix rates separately for domestic and foreign operations—a power which we do not dispute. They afford no support for the Board's asserted power to ignore excess subsidy profits from one division in awarding subsidy on another division.

III.

SECTION 406 (B) REQUIRES THE BOARD, IN DETERMINING A CARRIER'S SUBSIDY NEED, TO OFFSET ALL—NOT JUST SOME—OTHER REVENUE OF THE CARRIER

The Board's refusal to offset C & S's \$654,000 excess profits²⁹ on its domestic routes was made in

²⁸ The Board itself has recognized that its function in fixing mail pay differs "fundamentally from that which faces the public regulatory body in the fixing of rates for the transportation of passengers and property or in fixing the rates for public utility services." *Pan American Airways Co., Transatlantic Mail Rates*, 1 C. A. A. 220, 252-253.

²⁹ Petitioner Delta argues (Br. 49-52) that these profits were not "excess" because the Board recognized in fixing subsidy in 1948 that C & S's earnings might, if the carrier enjoyed a higher load factor than anticipated, exceed a 7.4 per cent return. The characterization of the \$654,000 as

the course of calculating the carrier's break-even point (R. 19). In refusing to make the offset—thereby giving the carrier \$654,000 extra subsidy—the Board did not hold that C & S “needed” that additional amount on its international operations. It merely concluded that such excess profits—admittedly “other revenue” (R. 54)—“should not be used to offset the ‘need’ resulting from the carrier’s international routes” (R. 55). This conclusion was grounded upon the Board’s view that, although it is required under Section 406 (b) to take all of a carrier’s other revenue into consideration in determining the need for subsidy mail pay, it nevertheless may, in its discretion, refrain from “reduc[ing] the carrier’s mail pay with any part of such other revenue if there are sound reasons for not doing so as a matter

“excess,” however, was made initially by the Board itself, in both its tentative findings (R. 21) and in its final opinion (R. 53). The earnings are deemed “excess”, not in any sense that C & S is not entitled to them, but only in that they exceed the amount which the Board in 1948 found was necessary to satisfy the carrier’s need.

In two recent tentative decisions the Board has stated that it used the term “excess” earnings in the instant case to refer “only to earnings in excess of a stated rate of return on investment,” and did not determine “how much, if any, of these ‘excess’ earnings should be considered as excessive in the sense that these earnings are available for or should be offset against the mail rate for the international division * * *. A determination that earnings are excessive in the latter sense obviously requires more than a mere subtraction of actual or estimated profits from an estimated rate of return on investment.” *Delta Air Lines, Mail Rates*, Order E-7738, n. 10, mimeographed p. 6 (Sept. 21, 1953); *Braniff Final Mail Rate Case*, Order E-7815, n. 9, mimeographed p. 7 (October 13, 1953).

of economic policy" (R. 54). In thus reading into the Act a discretionary power to disregard a portion of a carrier's other revenue because of economic policy considerations, the Board is departing from the clear intent of Congress that in awarding subsidy it must offset *all*—not just some—of such revenue. In short, the Board is writing into the Act its own notions of economic policy, where Congress left no room for such discretion.

1. The intent of Congress reflected in Section 406 (b) is that an air carrier is to receive only such subsidy mail pay as it "needs" (see Point I, *supra*, pp. 16-22), and that, in determining such "need," the Board is to offset all—not just a part—of the carrier's other revenue. The Act defines the carrier's need for subsidy as an amount which, "together with *all other revenue* of the air carrier" [emphasis added] is sufficient to enable the carrier to meet the statutory objectives. In other words, the Board is directed to award subsidy in an amount which, when added to all the carrier's other, *i. e.*, nonmail pay, revenue, will provide it with funds sufficient to carry out the national air transportation policy. Cf. *Pan American Airways v. Civil Aeronautics Board*, 171 F. 2d 139, 140 (C. A. D. C.).³⁰ The Board gives effect to this

³⁰ The court there stated: "It has developed in some cases that the carrier had no need for mail pay in addition to reasonable compensation for services rendered; but in other cases there was such need, because *all the other revenue* was not sufficient to enable the carrier to meet the objectives of the statute" [emphasis added]. And see *Seaboard & Western Air Lines v. Civil Aeronautics Board*, 181 F. 2d 515, 519 (C. A. D. C.), certiorari denied, 339 U. S. 963.

limitation through the procedure of offsetting such other revenue against the carrier's total break-even requirements (*e. g.*, R. 9-19).³¹

The reason Congress required the Board to offset *all* of a carrier's other revenue in determining subsidy need is clear. Airline subsidies obviously are intended to make up any deficit between the carrier's nonmail pay revenues and the total amount which the carrier needs to enable it to "maintain and continue the development of air transportation." Such deficit is the measure of the carrier's "need" for subsidy. To whatever extent the carrier has other revenue, the deficit and, consequently, the need for subsidy, are correspondingly reduced.

If however, the Board can ignore portions of such other revenue—for whatever reason—the inevitable result would be to give the carrier a subsidy in excess of its actual need. It was presumably to avoid just that result that Congress required the Board to offset "all other revenue of the air carrier." The term "all other revenue" is clear; it does not mean "all or some part of other revenue." Had Congress intended to allow the Board to disregard any portion of such other revenue, it would have said so in plain terms, and not used the unequivocal "*all* other revenue." [Emphasis added.] The practical effect

³¹ The fact, referred to by Judge Prettyman in his dissenting opinion below (R. 76), that the Act does not refer to offsets and deductions, is immaterial. The significant fact is that the Act shows on its face that subsidy need is to be determined in relation to *all* other revenue.

of the Board's construction would be to read the "all other revenue" clause out of the Act.

Indeed, where Congress intended to give the administrative agency discretion to award subsidy without regard to specific statutory limitations—as the Board here in effect is claiming—it did so in clear language. Thus, Section 2 (e) of the Emergency Price Control Act of 1942, 56 Stat. 24, 50 U. S. C. Appendix 902 (e), authorized the Administrator of Price Control, whenever he determined that the maximum necessary production of any commodity was not being obtained, "to make subsidy payments to domestic producers of such commodity *in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof * * **" [emphasis added].

The Board plainly is given no such discretionary authority by Section 406 (b), which limits total subsidy to "the need of each such air carrier for compensation * * * sufficient * * * together with all other revenue of the air carrier * * *" to meet the statutory objectives. A statute providing for Government subsidy of private enterprise is, as this Court repeatedly has pointed out,³² to be strictly construed—so as to give effect to the limits pre-

³² *Slidell v. Grandjean*, 111 U. S. 412, 437; *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 49; *District of Columbia v. Johnson*, 165 U. S. 330, 338; *Northern Pacific Railway Company v. Soderberg*, 188 U. S. 526, 534; *Northern Pacific Railway Co. v. United States*, 330 U. S. 248, 257.

scribed by Congress in an endeavor to safeguard against unwarranted payment of public funds.

Nor is there any merit to petitioners' argument (Board's Br. 40-41, Delta's Br. 53-58) that the Act merely requires the Board to "consider" such other revenue, and that once the Board has done so, it then may, in its discretion, offset such other revenue in whole, in part, or, indeed, not at all. In the first place (as petitioner Delta admits, Br. p. 20, n. 12), as a matter of syntax the words "take into consideration" modify "need," not "all other revenue." And, as we have noted (*supra*, pp. 20, 32-34), they do not authorize the Board to award subsidy in excess of such "need" by "considering" and then disregarding it. But even if the words "take into consideration" were deemed to modify the words "all other revenue," this would not aid petitioners. For, as we have shown, Congress intended in Section 406 (b) to limit subsidy to the carrier's actual need, defined as an amount which, together with all the carrier's other revenue, will enable the carrier to meet the statutory objectives. This purpose would be defeated if the Board could "consider" such other revenue and then, having "considered" it, could offset it or not as it saw fit. If "take into consideration" does refer to other revenue, Congress plainly meant the Board to "consider" all other revenue in the sense of offsetting it.

Neither *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U. S. 604, nor *New York v. United States*, 331 U. S. 284, upon which petitioners rely, supports their contention that the Board in its dis-

cretion can refuse to offset any part of other revenue. In the *Roig* case, the Court upheld an order of the Secretary under the Sugar Act of 1948, 61 Stat. 922, 7 U. S. C. (Supp. V) 1100 *et seq.*, which allotted the Puerto Rican sugar quota among sugar marketers. Section 205 (a) of the Act provided that such allotments were to be made "by taking into consideration" three factors: (1) "processings of sugar * * * to which proportionate shares * * * pertained"; (2) past marketings; and (3) ability to market the amount requested. In making the allotments, the Secretary gave equal weight to the second and third of these factors, but concluded that no weight could be given to the first factor because it referred to processings of raw sugar from sugar cane, whereas the three largest Puerto Rican refiners dealt with raw sugar that had already been processed. This Court, in sustaining the allotment order, held that under the Act the Secretary could exclude quantitatively a factor which "has no significance" (p. 613). In other words, the Court held that a statutory factor which is not applicable to a particular case can be disregarded. Thus, if an air carrier transported only mail, and had no non-mail revenue, there would be no other revenue for the Board to offset. The *Roig* case does not hold—as petitioners would interpret it—that if the Puerto Rican refiners had processed raw sugar from sugar cane, the Secretary nonetheless could have excluded portions of such processings from the allotment formula.

In the *New York* case the Interstate Commerce Commission, pursuant to its power under Section 15 of the Interstate Commerce Act, 24 Stat. 384, 49 U. S. C. 15, to prescribe just and reasonable rates, had ordered nation-wide freight increases in order to remove discrimination. Section 15a (2) of the Act directs the Commission, in prescribing such rates, to "give due consideration," among other factors, to "the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such [adequate and efficient railway transportation] service." In upholding the order against an attack that the prior rates had not been, *inter alia*, noncompensatory, the Court held that the significance of the different factors in determining the reasonableness of rates was "for the Commission to determine" (331 U. S. at 349). But the *New York* case did not involve the subsidy need of a carrier, which is to be determined in relation to all of its other revenue. It involved the reasonableness of shipping rates fixed by the Commission to remove discrimination. The *New York* case affords no basis for the Board's claim that it can ignore substantial portions of a carrier's other revenue in determining subsidy need.

2. Petitioner Delta argues (Br. 19, 27), and petitioner Board (Br. 26, n. 17) and the *amici curiae* (Br. 11) suggest, that offsetting of C & S's excess domestic profits would constitute a recapture of earnings and revision of a closed rate which, under *Transcontinental and Western Air, Inc. v. Civil Aeronautics*

Board, 336 U. S. 601, is beyond the Board's power. We submit, however, that the *TWA* decision clearly is not applicable to the case at bar.

In the *TWA* case, the Board in 1945 had fixed a per ton mile *service* rate of 45 cents effective January 1, 1945.³³ On March 14, 1947, the carrier petitioned the Board to fix a higher rate for its domestic operations from January 1, 1946. *Pennsylvania-Central Airlines, Motions*, 8 C. A. B. 685, 686-687. The Board dismissed the petition insofar as it sought a retroactive increase for the period prior to filing the petition, on the ground that the Board had "no power to fix a new rate for an operation to apply to a period during which a final rate for that operation was in effect and not challenged by the initiation of a proceeding looking towards its revision." *Id.*, at 703. This Court upheld the Board's order.

As the Board concedes (Br. 26, n. 17), the only issue decided in the *TWA* case was whether Section 406 (a) of the Act, which authorizes the Board to make mail pay rates "effective from such date as it should determine to be proper," empowers it to make a new rate "retroactive for a period in which a final [service] rate previously fixed by the Board was in effect and unchallenged by the initiation of a mail

³³ The Board simultaneously fixed the same service rate for the other "big four" domestic carriers. *Eastern Air Lines, Mail Rates*, 6 C. A. B. 551; *American Airlines, Mail Rates*, 6 C. A. B. 567; *United Air Lines, Mail Rates*, 6 C. A. B. 581.

rate proceeding" (336 U. S. at 602).³⁴ In answering that question in the negative,³⁵ the Court was not called upon to—and did not—decide any of the broader issues under Section 406 (b) which the case at bar presents. We do not believe the Court was purporting to determine in advance that, if the carrier ultimately should have excess earnings under a previously-fixed domestic subsidy rate, such excess could not be offset in determining the carrier's international subsidy need.³⁶ The two issues are

³⁴ The only questions presented by petitioner in the *TWA* case related to the Board's *power* under Section 406 (a) to make the order retroactive. Petition for Writ of Certiorari, No. 387, October Term, 1948, pp. 5-6; Brief of Petitioner, *ibid.*, p. 3.

³⁵ The Court stated that Section 406 (a) was not intended to "mark a departure from the customary [public utility rate-making] pattern of fixing rates prospectively," but "only to make clear that the rates could be made retroactive to the date of the application" (p. 605).

³⁶ Although the Board stated in the *TWA* case that, because it considered *TWA*'s domestic and international operations as separate units for rate-making, it would not set a system-wide rate for the carrier (8 C. A. B. at 702-703), that issue was not presented to this Court. Moreover, in so stating, the Board obviously was not purporting to decide how much subsidy *TWA* ultimately would need on its international operations. The carrier's domestic division had then become unprofitable, and soon thereafter was given a higher temporary rate. 9 C. A. B. 929 (May, 1948). Moreover, the Board's own precedents at that time indicated that excess profits on one division would be offset in awarding subsidy on another division. See *supra*, pp. 23-26, particularly the *Pan American* cases discussed at pp. 24-25.

separate and distinct, and the applicable policy considerations are different.

The Court's concern in the *TWA* case was that retroactive revision of closed service rates would place such rates on a "cost-plus" basis (pp. 606-607). In other words, even though a final service rate was fair when fixed, it would always be subject to retroactive increase if, for any reason,³⁷ the carrier's financial situation subsequently deteriorated. The issue in awarding subsidy, however, is not the fairness of compensation for carrying the mail, but the extent of the carrier's need. And since the need is that of the carrier as a whole, the carrier's total subsidy requirements for the period involved can be finally determined only when both domestic and international subsidy proceedings have been completed.³⁸

Offsetting of excess profits which accrued under a closed domestic subsidy rate constitutes neither a "recapture" of such profits nor a "revision" of the domestic rate, cf. *Pan American Airways v. Civil*

³⁷ TWA attributed its domestic financial difficulties primarily to the grounding of its Constellation aircraft and a pilots' strike. Transcript of Record, No. 387, October Term, 1948, p. 9.

³⁸ Petitioner Delta's contention (Br. 28-30) that offsetting excess domestic subsidy profits would result in a cost-plus system of rate-making overlooks the fact that subsidy for a past period always is fixed on that basis. For in such cases the Board awards subsidy which gives the carrier its costs (including taxes) plus a fair profit. By making the offset, the cost element is reduced.

Aeronautics Board, 171 F. 2d 139, 141 (C. A. D. C.).³⁹ The carrier retains every cent of subsidy which it has received on its domestic operations. Such offset merely reflects the fact that the Act limits a carrier's need to an amount which, "together with all other revenue of the air carrier," will enable the carrier to accomplish the national air transportation policy.

There is no issue here of the Board's power—or duty—to make up losses which may occur under a closed domestic subsidy rate in fixing international subsidy for the same period. Whether a carrier's over-all need is increased because domestic subsidy profits were less than anticipated depends upon many factors, including whether such lower domestic profits resulted from lack of economical and efficient management. But whether the Board might conclude that, under certain exceptional circumstances, a carrier needed additional subsidy on its foreign operations because of lower-than-estimated domestic subsidy profits, is not presented by these cases.

³⁹ In the *Pan American* case, Axis countries had been indebted to the carrier for carriage of mail, at the outbreak of the war, but such sums were uncollectible. In determining the carrier's net revenues for subsidy mail pay purposes, the Board excluded these sums, for which reserves had been set up on the carrier's books. However, the Board provided that, if and when they were collected, they were to be considered as income, and the Postmaster General was directed to offset them against amounts otherwise due the carrier. The Court of Appeals rejected the carrier's argument that this procedure constituted a "recapture" of its assets.

3. Finally, petitioners make a number of arguments in an attempt to show the allegedly harmful effects of compulsory offsetting upon the airline industry. Many of them deal with offsetting of excess non-subsidy earnings, a problem which may involve different policy considerations than does the instant case. In the first place, these arguments are all beside the point. As we have shown, Congress has already weighed the various economic arguments and has not allowed the Board any discretion to refuse to offset any portion of a carrier's other revenue, no matter for what reason. In any event, these arguments will not withstand analysis.

a. Petitioners contend (Board's Br. 28-29, Delta's Br. 34-36, *Amici's* Br. 25-26) that compulsory offsetting of excess domestic profits against need on international operations might result in withdrawal of the domestic carriers from the international field. They argue that domestic carriers with international divisions would be at an economic disadvantage in relation to their competitors who operate only domestically, since the latter could retain any excess earnings while the former would have such earnings "recaptured" to reduce foreign subsidy payments. Under such conditions, they suggest, the domestic carriers would have no incentive to conduct foreign operations, and would withdraw from, or decline to go into, the foreign field. Such a result, they contend, would contravene the Government's carefully determined national policy that American inter-

national air transportation should be conducted competitively by domestic carriers.

The possibility of such withdrawal from international operations is wholly conjectural, and without support in the record. In the case of carriers whose domestic operations are subsidized, the argument rather dubiously assumes that a carrier would refuse to conduct international operations, admittedly profitable, because its total subsidy is not permitted to exceed a fair over-all return. Further, it ignores the fact that the Board is bound to act promptly to reduce domestic subsidy payments which produce excess profits, so that any such profits would be of brief duration.

Nor can it be supposed that the Board would permit a carrier with unsubsidized domestic operations to earn an excessive rate of return for any extended period. The Board has plenary power under Section 1002 of the Act to reduce passenger fares and freight charges which yield more than a fair rate of return,⁴⁰ and presumably will exercise that power with dispatch whenever earnings become excessive.

⁴⁰Section 1002 (d) authorizes the Board whenever, upon complaint or upon its own motion, it determines that any existing rate, fare or charge, or the value of the service thereunder, is unjust and unreasonable, to prescribe a "lawful" rate, fare or charge. Fares and charges which produce an excessive return clearly are unjust and unreasonable. Section 1002 (e); Burt and Highsaw, *Regulation of Rates in Air Transportation*, 7 La. L. Rev. 1, 7-12.

The argument thus comes down to this: carriers are likely to give up a business in which, under the Board's current policy, the Government guarantees them ten percent after taxes. The reason for this abandonment will be solely because excess earnings on another portion of their business may be offset for that relatively brief period until the Board can take corrective action.⁴¹ This is an argument which seems contrary to ordinary patterns of economic behavior, and seemingly contravenes the carriers' own long-term economic self-interest. In the absence of clear and convincing proof of its validity, it cannot be accepted. If the point ever is reached where compulsory offsetting threatens actual withdrawal of domestic carriers from the international field, there will be ample opportunity to seek remedial legislation.

b. Similarly without merit is the argument that domestic carriers with international operations would have no incentive to operate efficiently if their excess domestic earnings were to be offset. This argument overlooks the fact that the Act requires a subsidized carrier to have economical and efficient management. A carrier which fails to meet this standard is likely to have its subsidy reduced (see our discussion of this point in our brief in *Civil Aeronautics Board v. Summerfield*, Nos. 224 and 225, this Term, pp. 28-30). A

⁴¹ As the Board recognizes (Br. 29), this would be a dubious basis for finding that abandonment of the international route would be in the public interest—a finding which Section 401 (k) requires as a condition to any abandonment of a route.

nonsubsidized carrier's incentive for efficiency is to insure that its income is sufficient to produce the maximum fair return. It may not be a simple matter for a carrier actually to earn eight percent under a domestic service rate, and this attempt may present greater problems to many carriers than the offsetting of earnings in excess thereof.

c. Nor is there substance to the contention that compulsory offsetting would injure the financial stability of the affected carriers, prevent them from obtaining more modern aircraft, and deprive the public of improved service which greater over-all funds would permit. The only earnings to be offset are those in excess of the carriers' needs, and the Board presumably gives sufficient subsidy to enable the carrier to satisfy those objectives.⁴² The carriers have no valid claim to any more.

⁴² The Board suggests (Br. 26) that, because the domestic earnings of TWA, Braniff, Delta and Northwest "will be insufficient to support their international operations," these carriers (now on domestic service rates) will "soon" require subsidization of domestic operations. This argument loses sight of the fact that only excess earnings are to be offset. A carrier earning seven or eight percent obviously has no need for subsidy.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1953.

APPENDIX

Chicago and Southern—Domestic Services

Reported	1948	1949	1950	1948-50 total
U. S. mail revenues received.....	¹ \$1,891,089	¹ \$1,800,384	² \$1,747,319	\$5,439,602
U. S. mail ton-miles of traffic.....	³ 481,731	³ 520,462	⁴ 608,040	
U. S. mail revenues per ton-mile of U. S. mail.....	¹ \$3.92	¹ \$3.45	² \$2.87	
COMPUTATIONS				
If a mail service ton-mile rate of.....	¹ .53	¹ .53	¹ .53	
were applied, the resulting mail re- venues would be.....	255,317	275,845	322,261	853,423
Subsidy estimated by subtracting revenues computed on 53¢ ton-mile rate basis from mail revenues actually received.....	1,636,672	1,524,539	1,425,058	4,586,269

SOURCE

¹ C. A. B. Recurrent Reports of Financial Data, C. & S. (Domestic Services), 4th Quarter of 1949.

² C. A. B. Recurrent Reports of Financial Data, Domestic Air Mail Carriers, Trunk Lines, 12 months ended 12-31-50, p. 2 of 4.

³ C. A. B. Recurrent Report of Mileage and Traffic Data, C. & S. (Domestic Services), 4th Quarter 1949.

⁴ C. A. B. Recurrent Report of Mileage and Traffic Data, Domestic Air Mail Carriers, Trunk Lines, 12 months ended 12-31-50, p. 2 of 4.

⁵ This 53¢ per ton mail rate was utilized by the Board in calculating C & S's subsidy in its Report on Administrative Separation of Subsidy from Total Mail Payments to Domestic Air Carriers, *supra*, note 9, and was applied by the Board in separating the carrier's service mail pay from subsidy. *Chicago and Southern Airlines, Domestic Operations*, Docket No. 5144, Order No. E-5869, November 15, 1951. There the Board, in fixing prospective annual mail pay of \$1,045,000, stated that \$362,000 represented service mail pay at 53¢ per ton-mile "and the balance of \$683,000 is subsidy." (*Id.* at mimeographed p. 7).

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 222

CIVIL AERONAUTICS BOARD, *Petitioner*,

v.

ARTHUR E. SUMMERFIELD, Postmaster General of the United States, and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General, *Respondents*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF BRANIFF AIRWAYS, INC., NORTHWEST AIRLINES, INC., AND TRANS WORLD AIRLINES, INC. AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1953

No. 22

CIVIL AERONAUTICS BOARD, *Petitioner*,

v.

THUR E. SUMMERFIELD, Postmaster General of the United States, and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General, *Respondents*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF BRANIFF AIRWAYS, INC., NORTHWEST AIRLINES, INC., AND TRANS WORLD AIRLINES, INC. AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

This Brief is submitted, pursuant to Rule 27 (9)(b), by Braniff Airways, Inc., Northwest Airlines, Inc., and Trans World Airlines, Inc., as *amici curiae* in support of the petition for a writ of certiorari filed by the Civil Aeronautics Board. Each of these carriers holds certificates of public convenience and necessity issued by the Civil Aeronautics Board authorizing them to engage in both interstate and foreign air transportation.

The decision of the Court of Appeals for the District of Columbia Circuit relates to a decision of the Civil Aeronautics Board fixing final rates of mail compensation to

be paid to Chicago and Southern Airlines, Inc., for services provided over its international routes.¹ The Court held that the Board was required by the Civil Aeronautics Act to offset against the carrier's mail pay need on its international services any so-called "excess" profits earned by it on its domestic routes. Although the rates established by the Board are applicable only to Chicago and Southern and to the services provided by it over its international routes, the Postmaster General has made it known that he will urge that the decision of the Court of Appeals for the District of Columbia Circuit be applied to the domestic and international services provided by the *amici curiae*.

Important considerations of public interest and national policy in the field of air transportation are directly affected by the disposition made of the issues in this case. Such issues warrant review by this Court.

REASONS FOR GRANTING THE WRIT

I

The Effect of the Decision of the Court of Appeals on the Air Policy of the United States Government With Respect to International Air Transportation.

The present system of international air transportation operated by United States air carriers was created pursuant to a National air policy. This National air policy and the system of international air services created pursuant thereto are placed in jeopardy by the decision of the Court of Appeals.

Prior to World War II, a single United States air carrier operated this country's entire system of international air services (other than transborder operations into Canada). Technical advancements in aviation arising out of the War foreshadowed a very substantial expansion of commercial air transportation with the coming of peace,

¹ Chicago and Southern Airlines was merged into Delta Airlines on May 1, 1953.

particularly in connection with international air services, and it was recognized that this Government would then be faced with important questions of National air policy. Should the existing protected monopoly system be continued or should a system of competitive international air routes be created? Should carriers operating domestically be permitted to expand internationally, or should new companies be developed to provide competitive international services? These questions touched upon considerations of national defense, as well as upon considerations of foreign commerce.

Accordingly, exhaustive study of future policy with respect to international air transportation was undertaken early in 1943 by the Civil Aeronautics Board, the War Department, the Navy Department, the Department of State, the Post Office Department and the Bureau of the Budget. Interdepartmental working committees were set up to review the problems and to report to the various Departments and to the President. From this there evolved in 1944 a unanimous policy determination that the National interest required that United States international air routes should not be operated by a single United States air carrier, a so-called "chosen instrument," but that several United States air carriers should be authorized to operate in this field.

The considerations of National interest which lead to this policy determination are set out in detail in two decisions of the Civil Aeronautics Board, *American Export Airlines, Trans-Atlantic Service*, 2 C.A.B. 16, and *North-east Airlines, et al., North Atlantic Route Case*, 6 C.A.B. 319, and also in testimony and reports presented by interested Government agencies at Congressional hearings on the subject, *Hearings Before the Subcommittee on Aviation of the Committee on Commerce, United States Senate, 79th Congress, 1st Session, on S. 326*; *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Congress, 1st Session, on Bills Rela-*

tive to Overseas Air Transportation; and Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 80th Congress, 1st Session, on S. 987. Each of the foregoing Congressional hearings involved legislation proposing that the United States should authorize only a single air carrier to operate this country's system of international routes. None of these bills was favorably reported.

This policy of competitive international air services was implemented by the Civil Aeronautics Board, with the approval of the President, by the issuance of certificates for international routes to a number of different United States air carriers. In the case involving routes across the North Atlantic the Board determined as a matter of policy that there were important advantages to the National interest in authorizing United States *domestic* air carriers to operate a part of this country's system of international air routes. This policy decision was approved by the President and was followed in later cases involving the establishment of other competitive international air services.²

Following the formulation of this National air policy and its implementation by the Civil Aeronautics Board and the President in a series of cases where certificates were awarded to domestic carriers authorizing them to engage in international transportation, the entire subject was reviewed in 1948 by the President's Air Policy Commission. After lengthy hearings and consideration, the Commission concluded:

² TWA, a domestic air carrier, was issued a certificate for routes across the North Atlantic to Europe and to Africa and beyond to the Orient. Braniff Airways, a domestic air carrier, was issued a certificate for a route from the United States through the Caribbean and down the West coast of South America to Rio de Janeiro and Buenos Aires. Northwest Airlines, a domestic air carrier, was issued a certificate for routes from the United States across the North Pacific to points in Asia. Chicago and Southern Air Lines (now Delta), a domestic air carrier, was issued a certificate for routes from the United States to Caribbean points and the North coast of South America.

"We agree with the present Civil Aeronautics Board policy which favors limited competition among American operators on international routes. We have studied the testimony before the Interstate and Foreign Commerce Committee of the House of Representatives in the Spring of 1947, in which both sides of the issue were exhaustively presented. The Commission has also heard testimony from those advocating one international air line instead of a number of lines operating abroad.

"Some forecast that we shall carry less and less international traffic through inability to compete with low-cost, heavily-subsidized, foreign air lines and that we shall be driven from the skies, as our Merchant Marine was once driven from the sea. We do not agree with this pessimism. We believe that our international operators should receive such Government aid as will permit them to compete effectively with their foreign rivals. American technical and managerial ability, plus the spur of competitive effort, should win for them a substantial share of the world's traffic. The policy of regulated competition that has assured the development of our domestic air lines should be followed in our international system. Present competition seems only adequate to provide the desired incentive to management and a yardstick for comparison between American carriers."³

The decision of the Court of Appeals for the District of Columbia Circuit places in serious jeopardy the continuance of this long-standing and carefully developed policy of the Government with respect to the framework of its international air transport system. To require, as the opinion of the majority requires, that domestic earnings of an air carrier be offset against international losses will weaken, if not destroy, the incentive of the air carrier operating both international and domestic services to continue operating international services because of the resultant

³"Survival in the Air Age", A Report by the President's Air Policy Commission, January 1, 1948, pages 118-119.

adverse effect on its competitive status in the domestic field.

Domestic carriers which operate international routes are engaged in vigorous competition domestically with air carriers who are engaged exclusively in domestic air service and whose domestic earnings would not be subject to offset against international losses. Under the Court of Appeals' decision equality of competitive opportunity among domestic air carriers would be severely prejudiced, if not eliminated, if one group of domestic air carriers, which also happen to operate international services, are subject to the offset made mandatory by the Court's decision and thereby rendered incapable of maintaining the same level of domestic earnings as its competitors who do not operate international routes.

In such a situation an air carrier operating domestic service would be reluctant to enter the international field for fear of jeopardizing its competitive position in the far larger domestic market. Moreover, certain of the existing carriers operating both types of service may be faced with the prospect of withdrawal from the international field in order to maintain their domestic position. Such action, among the carriers best able to provide international competition, would frustrate the National policy of competitive international air services by United States carriers.

The Civil Aeronautics Board in its mail rate proceedings has classified the international and domestic air services of a single air carrier as different classes of service for rate-making purposes and has treated such services as constituting separate rate-making units. It has not offset earnings between the two classes of service. It has geared its rate-making processes to the preservation of the basic conditions essential to support the established National air policy described above. The Court of Appeals decision states that the Board erred in that respect.

In view of the exhaustive consideration given to the present National air policy and in view of the adverse

impact which the Court of Appeals opinion will have upon the international air transportation system developed by the Board and the President pursuant to that policy, the decision of the Court of Appeals should not be permitted to stand unless affirmed by the Supreme Court.

II

The Effect of the Decision of the Court of Appeals on the Public Interest in Lower Rates on Domestic Air Routes.

The Court of Appeals decision will prejudice the public interest in lower passenger and cargo rates on domestic air services.

With the substantial increase in the use of air transportation in recent years, it has been possible for a number of domestic air carriers to operate their domestic services at compensatory mail rates and without any element of subsidy. Further increases in the use of air transportation can open the way for reductions in passenger and cargo rates, increases in the volume of air coach services, and other benefits to the public.

However, the offset doctrine advanced by the Court of Appeals would shut the door to these improvements in service to the public at least insofar as such improvements might be made available by carriers who happen to operate both domestic and international services. Domestic earnings of carriers operating both domestically and internationally could not be used for this purpose but would have to be siphoned off first to support the more expensive and less profitable international services.

Passenger and cargo rates must be substantially the same as between competing carriers. For example, Braniff Airways and American Airlines compete with each other on the domestic Chicago-Dallas route. Effective competition would not be possible if Braniff's passenger and cargo rates were higher than American's or if Braniff were unable to match any reduction in rates which American might offer to the public. American operates no system of inter-

national routes (other than trans-border routes) and its domestic earnings are available for possible reduction in rates on its domestic system and for the acquisition of more deluxe equipment or for indulging in other competitive attractions which Braniff could not afford if Braniff's domestic earnings must first be used to off-set losses on its international services. In such an event Braniff is faced with the alternative of operating its domestic services at higher rates than its competitors or of meeting the rate levels and other customer attractions of its competitors and asking the Civil Aeronautics Board to subsidize the losses incurred thereby through mail pay. What has been stated above with respect to Braniff applies equally to Northwest and Trans World, which also compete domestically with carriers whose operations are confined to the domestic field.

III

The Effect of a Court of Appeals Decision on the Board's Ability to Fix "Class" Rates Under Section 406(b) of the Act.

Section 406(b) of the Act, 52 Stat. 998, 49 U.S.C. 486, empowers the Board to "fix different rates for different air carriers or classes of air carriers, and different classes of service". This Court has recognized that a class rate is "an important regulatory device". In *Transcontinental & Western Airlines, Inc. v. Civil Aeronautics Board*, 336 U.S. 601, 606 (1949), the Court said:

" . . . Thus § 406(b) authorizes the Board to fix rates for 'classes of air carriers'. *It is plain that the uniform rate for the class is an important regulatory device.* For § 2(d) of the Act looks to the sound development of an air transportation system through competition. A uniform rate forces carriers within a given class to compete in securing revenue and in reducing or controlling costs." (Emphasis supplied)

The Court of Appeals decision would destroy the basis for fixing rates by classes and defeat the regulatory advantage derived from a uniform rate.

That can be seen by referring to the method of fixing such class rates. The Board establishes class rates in the domestic field by grouping in one class all of those carriers whose *domestic* routes are comparable. Thus in theory all carriers in the group have the same opportunity, they receive the same incentive, and the relative success or failure of each carrier in the group is dependent on its individual initiative in developing revenue and minimizing expense in its domestic service.

Under the Court of Appeals decision equal opportunity would no longer exist. As a result of the decision, a carrier with both domestic and international routes would have a risk not imposed on other domestic carriers. The domestic route would no longer be a self-contained unit that can be classified as comparable to other purely domestic routes. The relative success or failure of the domestic route under such circumstances would not be the result of the carrier's initiative in its domestic operations but would be diluted by the extent to which the carrier was called upon to make up deficiencies in international mail need.

The effect of the Court of Appeals decision on the ability of the Civil Aeronautics Board to establish class rates can best be understood by reference to the rates now applicable to the carriers appearing as *amici curiae*.

TWA is both an international and domestic carrier. Internationally, TWA is certificated to operate the North Atlantic route to Europe and then onward via various intermediate points as far as China. Rates for the international route are in the process of being established by the Board. In the domestic field it has operated since 1942 under a uniform mail rate for a class of carriers known as the "Big Four". At present, and for some time past, this rate has been a compensatory rate, including no element of subsidy. It is the lowest rate of mail compensation in the air transport industry. This rate has been set on the basis of the characteristics of the carrier as a class and on the theory that the *domestic* operations of this group of car-

riers are comparable. None of the other carriers in the class has an international operation except for certain limited trans-border services which the Board has treated as part of the domestic routes for mail rate purposes. The decision of the Court of Appeals threatens to impose a burden on TWA's domestic route that is not imposed on any of the other members of the Big Four.

Northwest, like TWA, operates a domestic as well as an international operation. Its international route provides service from the United States to the Orient via Alaska. However, Northwest is not in the Big Four class, but in a separate group receiving a compensatory rate, without subsidy, for slightly smaller carriers. The Court of Appeals opinion would subject Northwest to a risk not borne by any of the other domestic carriers with which it has heretofore been classified.

Braniff is also both a domestic and international carrier. Braniff's international service extends south to Latin America. Braniff receives compensatory payments in the same class with Northwest, but in addition requires subsidy payments in order to provide service to the many small unprofitable points on its domestic system. Each receives a "class" rate, but each is different.

The important point is that the grouping of carriers within classes is based on characteristics of the domestic routes operated by these carriers compared with other domestic routes. The necessity of burdening domestic operations with the need for international operations would not only destroy the basis of classification followed by the Board, but would also destroy the purpose of classification; namely, the use of the uniform rate as "an important regulatory device" for the development of air transportation through competition. A uniform rate cannot be prescribed where uniform opportunity and risk do not exist.

Under the Court of Appeals decision the Board would lack power to establish truly separate and distinct rates for the different operating divisions of a carrier. A nom-

inal "class" rate for any one division would be subject to readjustment based on the results of another division. Thus, it would no longer be more than a token device and the important regulatory features recognized by the Court would be lost. If, on the other hand, the Board were to attempt to set a rate for the entire systems of any of the carriers appearing as *amici curiae*, the differences would be so great both internationally and domestically that establishment of a "class" rate would be impossible. The destruction of class rates is a question of serious import in a vital industry. Certainly the power conferred by the Act and recognized by this Court as an "important regulatory device" should not be substantially abolished without a clear pronouncement by the Court.

IV

There Will Be Continuing Litigation On These Issues Until the Supreme Court Renders a Final Decision.

The issues involved in the Court of Appeals decision are recurring ones which will arise frequently in varied forms in the future in the Board's day to day administration of the mail-rate provisions of the Act. The important bearing of these issues on the public interest has been outlined above. The decision of the Court of Appeals lays down controlling principles for a continuing administrative course of action in a field of substantial public importance. An authoritative construction of the statute by the Supreme Court should be secured at the earliest possible date.

A substantial divergence of views was expressed by the Justices of the Court of Appeals. Three separate opinions were written, one of them a dissenting opinion. In view of this, it is apparent that future cases involving these issues will be taken to the courts if the Board is forced to proceed with its administration of the Act solely on the basis of the Court of Appeals decision. Other proceedings involving the same issues are now pending before the Board

with respect to other carriers and are subject to Board determination in the near future. Further litigation will undoubtedly arise from these unless the Supreme Court authoritatively settles the issues.

Under the Civil Aeronautics Act it is possible for another carrier to appeal the same issue to a court of appeals for another circuit which might reach the opposite conclusion. If this should occur the carriers and the Civil Aeronautics Board would be involved in complications which might require years to straighten out. Until the matter is settled beyond dispute, the rates to which these carriers are entitled are uncertain, thereby casting a cloud over the financial status of the industry. In addition, if the Act is finally construed as frustrating our established National Air Policy, statutory amendments may be desirable. Thus a decision at the outset by the Supreme Court will determine whether recourse must be had to legislative relief and will, in addition, avoid a needless chain of litigation.

CONCLUSION

Because of the substantial impact of the decision of the Court of Appeals for the District of Columbia Circuit on the public interest, on National air policy, and on the continuing administration of the mail-rate provisions of the Civil Aeronautics Act, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CONSENT:

The undersigned hereby consent to the filing of the attached Brief filed on behalf of Braniff Airways, Inc., Northwest Airlines, Inc., and Trans World Airlines, Inc., as *amici curiae* in support of the petition for a writ of certiorari filed by the Civil Aeronautics Board.

Acting Solicitor General.

Attorney for Delta Airlines.

General Counsel, Civil Aeronautics Board.

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HAROLD B. WILLEY, C

IN THE
Supreme Court of the United States
October Term, 1953

No. 222

CIVIL AERONAUTICS BOARD,

Petitioner,

v.

ARTHUR E. SUMMERFIELD, *Postmaster General of the United States*, and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General,

Respondents.

No. 223

DELTA AIR LINES, INC.,

Petitioner,

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ARTHUR E. SUMMERFIELD, *Postmaster General of the United States*, and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General,

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=====

**BRIEF FOR BRANIFF AIRWAYS, INC., NORTHWEST AIRLINES, INC., AND TRANS WORLD AIRLINES, INC.
AS AMICI CURIAE**

=====

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Northwest Airlines, Inc., Domestic Operations, C. A. B. Docket No. 3211, Serial Nos. E-6717 (August 21, 1952), E-6959 (November 17, 1952)	7, 9, 25
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Pennsylvania Central Airlines Corporation, et al., 8 C. A. B. 685 (1947) affd. sub nom. Transcontinental & Western Air Inc. v. Civil Aeronautics Board, 169 F. 2d 893 (C. A. D. C. 1948), 336 U. S. 601 (1949) ..	9, 18
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**BRIEF FOR BRANIFF AIRWAYS, INC., NORTHWEST AIRLINES, INC., AND TRANS WORLD AIRLINES, INC.
AS AMICI CURIAE**

Opinions Below

The opinion of the Court of Appeals reversing the order of the Civil Aeronautics Board, one judge dissenting, which has not yet been reported, appears at pages 68-72 of the

Transcript of Record. The opinions of the Civil Aeronautics Board, which have not yet been officially printed, appear at pages 6-58 of the Transcript of Record.*

Jurisdiction

The judgment of the Court of Appeals was entered on May 4, 1953 (77). The jurisdiction of this Court is invoked under 28 U. S. C. §1254 and section 1006(f) of the Civil Aeronautics Act of 1938, 52 Stat. 1024, 49 U. S. C. §646(f). The petitions for writs of certiorari were filed on July 31, 1953 and granted on October 12, 1953 (79).

Statute Involved

The pertinent provisions of the Civil Aeronautics Act are set forth in the brief of the Civil Aeronautics Board.

The Questions Presented

1. Does the Board have the power, in fixing a final mail rate for a past period for the international division of an air carrier which rate includes some subsidy, to refuse for important reasons of policy to offset any part of the carrier's domestic revenues earned under a previously fixed final mail rate for the carrier's domestic division, where that rate also included some subsidy?

* Unless otherwise stated, numbers in parentheses refer to the pages of the Transcript of Record and wherever italics appear they have been added. The Civil Aeronautics Board will sometimes be referred to as the "Board", the *amici* as "Braniff", "Northwest" and "TWA", and the Civil Aeronautics Act of 1938, as amended (52 Stat. 973, as amended, 49 U. S. C. §401) as the "Act".

The Board held that "while we are required to take into consideration the need of a carrier for mail compensation together with 'all other revenue,' we believe that we are not required by section 406(b) to reduce the carrier's mail pay with any part of such other revenue if there are sound reasons for not doing so as a matter of economic policy." The Board concluded that because such reasons were present in the case, "the earnings from C & S' domestic routes should not be used to offset the 'need' resulting from the carrier's international routes" (54-5).

The Court of Appeals reversed, Judge Prettyman dissenting, because it found that section 406(b) requires the Board to treat a carrier as a single entity and to include as "other revenue" so-called "excess" earnings on domestic operations in computing the need of its international operations (71).

2. If the Board did have such power, was it properly exercised in this case?

The Board refused to make the offset because it found in this and other cases that to require unprofitable foreign operations to be supported by domestic profits would

(1) force domestic carriers to abandon their foreign routes and result in the monopolization of foreign routes by an existing non-domestic carrier, or operation by a new company with inadequate finances and experience, or operation by a surface carrier, all contrary to established national policy and the public interest;

(2) make it impossible to fix uniform domestic class rates under which there will be competitive incentive for efficient domestic operations; and

(3) cause further, if not permanent, delay in the fixing of final mail rates which the Board concluded are needed to provide an incentive for efficient air carrier operations.

The Court of Appeals did not consider whether these were proper factors to be taken into consideration in determining whether to make the offset, because of its holding as to the Board's lack of power. However, the dissenting judge agreed with the Board's decision stating, 'It seems to me that the intermingling of foreign and domestic factors in the computation of each separate rate would lead to great confusion and to inaccuracy in supposedly separate results'' (76).

3. Does the Board have the power, under any circumstances, to refuse for important reasons of policy to offset part of a carrier's domestic earnings under a final subsidy-free mail rate, in fixing mail rates for the international division of the carrier?

The Court of Appeals did not expressly relate its decision to the peculiar facts of the case before it—where both the domestic and international divisions of the carrier were receiving a subsidy mail rate. Subsequently, the Postmaster General has urged the application of the Court of Appeals decision in mail rate cases involving carriers whose domestic mail rate was completely free of subsidy. *Delta Airlines, Inc. Mail Rates, Latin American Operations*, C. A. B. Docket No. 6110, Serial No. E-7738, pp. 6-15 (September 21, 1953); *Braniff Final Mail Rate* case, (domestic

operations) (C. A. B. Docket No. 5142, Serial No. E-7815 (October 13, 1953)).*

While the Postmaster General, in cases involving the *amici* now pending before the Board, is insisting on this expanded application of the Court of Appeals decision, the respondents in this case have indicated that the Court should limit its decision to the peculiar facts of the instant case. The opening sentence in "Memorandum for the Postmaster General and the United States of America", filed in this Court October 27, 1953, reads as follows:

"These petitions present the question whether section 406(b) of the Civil Aeronautics Act . . . requires the Civil Aeronautics Board, in fixing past subsidy mail pay for the international division of an air carrier, *to offset the carrier's excess subsidy earnings from its domestic operations.*"

Amici submit that if this Court should affirm, its decision should be expressly limited to the factual situation

* See also *Transatlantic Final Mail Rate Case*, C. A. B. Docket No. 1706, et al., Brief to the Examiner on Behalf of the Postmaster General, p. 12 (July 3, 1953):

"It is, of course, recognized that in the case of TWA the excess earnings of its domestic division were realized during a period when the carrier was operating under a final future mail rate determined to be subsidy-free or, as commonly designated, a service rate. To that extent there is a distinction between the C & S Case; C & S's domestic division realized excess earnings while operating under a final future subsidy rate. The Department does not believe that the fact that TWA operated under a service rate is of such a distinguishing nature with respect to TWA as to warrant a conclusion different from that reached by the Court in the Chicago and Southern Case."

here presented. The Board's power to refuse to offset under other circumstances and especially where a carrier receives no domestic subsidy, should either be recognized or left for future decision.

Statement of the Case

The facts of the case are stated in the brief of petitioner Delta. Here we will set forth those additional facts which will help explain the presence of *amici* in this case.

Amici, as well as petitioner Delta, are air carriers engaged in transporting persons, property and mail by aircraft within the United States and to foreign points under certificates of public convenience and necessity issued under the Act by petitioner Civil Aeronautics Board. Domestically, Northwest and TWA operate transcontinental routes stretching across the United States, while Braniff and Delta operate routes principally through the Middle West and South. Under separate international certificates, Northwest operates across the Pacific, TWA across the Atlantic, Braniff to South America and Delta through the Caribbean.*

* All of these routes were certificated by the Board after approval by the President under section 801 of the Act. In addition, Braniff's route was certificated pursuant to a directive from the President under such section: "Because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require * * * the extension of an additional carrier to South America as far south as Rio de Janeiro, Brazil, and Buenos Aires, Argentina." *Latin American Air Service* case, 6 C. A. B. 857, 860 (1946).

Delta had no international route prior to the merger with C & S.

On their domestic routes all four of these carriers face substantial competition from other air carriers which operate domestically only, except for "stub-end" routes classified by the Board as part of domestic services for rate making purposes. On their foreign routes *amici* are in competition with foreign airlines and with Pan American World Airways, Inc., the only United States carrier operating exclusively in the international field.* The international operations of *amici* and Delta, because of their distinctive character and extensive nature, have been classified as separate units for rate-making purposes. However, in the case of Northwest, its operations between points in the United States and points in Canada have been included in its domestic operations. See *Northwest Airlines, Inc., Domestic Operations*, C. A. B. Docket No. 3211, Serial No. E-6717, p. 1 (August 21, 1952).** There are no other U. S. air carriers similarly situated to *amici* and *Delta*, and therefore liable to be as directly affected by the decision in this case.

The Board, from its inception, has been primarily concerned with fixing final rates for the future. However, it has found it necessary, at times, because of the delays in-

* Pan American has an affiliate, Pan American Grace Airways, which also competes with Braniff between the United States and South America.

** Five other U. S. air carriers conduct "stub-end" operations into Canada, Mexico, Cuba and Bermuda, which, like Northwest's Canadian operations, are integrated with and treated as part of their domestic operations. See *National Airlines, Inc.*, C. A. B. Docket Nos. 3037, 3248, Serial No. E-6344, p. 4 (April 21, 1952); C. A. B. Report, *Administrative Separation of Subsidy from Total Mail Payments to United States Air Carriers, September 1953 Revision*, Appendices 6-10.

herent in the mail rate-making procedures, to fix temporary rates for a carrier pending the determination of a final mail rate, which is then made retroactive to the date of the commencement of the mail rate-making proceeding. See *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U. S. 601, 605 (1949). These delays have been appreciably greater in fixing international mail rates than in fixing domestic rates. Thus proceedings are still pending before the Board for the fixing of final international mail rates for TWA and Braniff for the entire period of their international operations—from 1946 in the case of TWA and from 1948 in the case of Braniff. *Transatlantic Final Mail Rate* case, C. A. B. Docket No. 1706 *et al.*; *Braniff Airways, Inc.—Mail Rates—Latin America Operations*, C. A. B. Docket No. 2886. But their domestic rates for that period and for the future have already been fixed. See, *In the Matter of American Airlines, Inc., et al.*, C. A. B. Docket No. 2849 *et al.*, Serial No. E-5715 (September 19, 1951); *Braniff Airways, Inc. Mail Rates—Domestic Operations*, C. A. B. Docket No. 5142, Serial Nos. E-7780 (October 1, 1953),* E-7815 (October 13, 1953).

In the *Transatlantic Final Mail Rate* case, *supra*, the Postmaster General has demanded that the Board reduce TWA's international mail pay for the past period by offsetting some domestic profits earned in 1951 and 1952, even though TWA received no domestic subsidy for those years and even though TWA's domestic mail rate for those years was finally fixed and cannot be reopened. See *Trans-*

* This tentative decision is still subject to final order of the Board, but Braniff has not objected to the proposed rate, which is a purely service rate without any subsidy element.

continental & Western Air, Inc. v. Civil Aeronautics Board, 336 U. S. 601 (1949).

In *Braniff Airways, Inc. Mail Rates—Domestic Operations*, *supra*, the Postmaster General has demanded that the establishment of Braniff's domestic mail rate for the period on and after October 1, 1951 be stayed until the proceeding involving its international rate is ripe for final determination. Should the decision below be affirmed, Braniff would be faced with the prospect of having its international mail rate offset by domestic profits all the way back to June 1948 when international operations were inaugurated by Braniff, notwithstanding the fact that between June 1948 and October 1951 Braniff's domestic system was operating under closed rates.

Neither TWA nor Braniff had the slightest reason to believe it necessary to set aside domestic profits earned in the past under final mail rates, for the purpose of "offset" against international needs. See *Pennsylvania Central Airlines Corporation, et al.*, 8 C. A. B. 685, 703 (1947) *affd. sub nom. Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 169 F. 2d 893, 336 U. S. 601. As a practical matter, the offset would amount to the recapture of funds already committed to the business of the two carriers or paid out in dividends. The effect of such recapture would seriously disrupt their businesses.*

* As to Northwest, both its international and domestic mail rates have been fixed, except for the year 1951, so that it is not as vulnerable to the recapture of past profits under the Court of Appeals decision as the other *amici*. *Northwest Airlines, Inc., Domestic Operations*, C. A. B. Docket No. 3211, Serial Nos. E-6717 (August 21, 1952), E-6959 (November 17, 1952); *Northwest Airlines, Inc. Mail Rates—Trans-Pacific Operations*, C. A. B. Docket No. 2539 *et al.*, Serial Nos. E-7079 (January 13, 1953), E-7136 (February 4, 1953).

For the future, *amici* and petitioner Delta will be at a serious disadvantage in competing with their domestic competitors that have no international routes to which the domestic profits may be siphoned off under the decision below.

The mail rates under which Delta and *amici* are operating domestically are devoid of subsidy and are called "service rates." They compensate "the air carriers for carrying the mail, reimbursing them for the related costs, including a fair return on the investment which is used in the mail service." C. A. B. Report, *Administrative Separation of Subsidy from Total Mail Payments to Domestic Air Carriers*, p. 8 (September, 1951). In this report, the Board classified the domestic carriers into seven groups "to reflect their relatively attainable unit costs as determined by the revenue ton-miles per station transported by each carrier" (*id.*, at p. 4). TWA's domestic division, and three other carriers which except for "stub-end" routes operate only domestically, are classified in Group I, which has the lowest service rate. The domestic divisions of Braniff, Northwest and Delta are classified in Group II, together with exclusively domestic carriers, which has a somewhat higher service rate than Group I (*id.*, September, 1953 Revision, Appendices I-V).

As will be shown below, the value of this classification in future rate-making proceedings may be substantially impaired by the decision of the Court of Appeals, since the combined domestic and international operations of Delta and *amici* cannot be properly classified with any other groups of carriers.

Summary of Argument

The Court of Appeals did not challenge the Board's finding that any offset would interfere with the furtherance of the basic objectives of the Act, including the development of economically sound domestic and international air transportation systems and the avoidance of monopolistic control of United States international air transportation.

Instead, the Court held that section 406(b) absolutely forbids the Board to refuse to offset, regardless of how cogent the reasons. It reached this conclusion by focusing on the words "all other revenue of the air carrier" in that section. But that is just one of the elements which the section directs the Board to "take into consideration, among other factors." This Court has previously recognized that such language empowers the administrative agency, after due consideration, to refuse to give any weight to one factor where to do so would interfere with the general scheme of an act and make it impossible to give effect to other and more pressing factors which the statute requires the agency to consider as well. *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U. S. 604 (1950).

Moreover, the Court of Appeals decision, if not directly in conflict with this Court's decision in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U. S. 601 (1949), certainly eliminates much of the practical significance of that decision; for, as the Board has pointed out in the case now pending before this Court and in subsequent cases, under the Court of Appeals decision carriers with domestic and international routes will be subject to a "cost-plus" system of regulation.

POINT I

The Act clearly delegated to the Board the power which the Court of Appeals held nonexistent.

This is the second time this Court has been called upon to determine the power of the Board under section 406 of the Act. In *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U. S. 601 (1949), the Court agreed with the Board that it had no power "to fix a new mail rate for air carriers and to make it retroactive for a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a mail rate proceeding" (336 U. S. at 602, 607).

The reason for that decision was that section 406 "reads like a typical public utility rate-making authority" (604), that there was nothing in the legislative history or scheme of the Act to indicate that it was not meant to be "typical" (605-606), and therefore the Board was right in holding that it could not make so "unprecedented a departure from the conventions of rate-making" (607).

In the current case, respondents challenge the Board's power to exercise a "typical public utility rate-making authority"—the power of the Board to decide, in its discretion, whether to treat separate operations of a carrier independently for the purpose of rate-making. Yet this power is one typically exercised by rate-making agencies. *American Toll Bridge Co. v. Railroad Commission of California*, 307 U. S. 486, 494 (1939) affg., 12 Cal. 2d 184, 83 P. 2d 1, 7-8 (Sup. Ct. 1938). As said in *Leeman v. Public Utilities Commission of District of Columbia*, 104 F. Supp. 553, 560 (D. C. 1952):

"Ordinarily, whether a smaller unit should be used as a basis for rate-making is a matter of discretion for the regulatory agency." *

That the separate classification of domestic and international operations is reasonable cannot be disputed since "many considerations which enter into the fixing of an international rate are different from those entering into the establishment of a domestic rate" (20). "Operating problems such as the necessity for special equipment for long over-water flights, customs procedures, problems of currency fluctuation and control, compliance with many and varied foreign laws, dealings and negotiations with foreign governments as well as the State Department, the pressure of foreign flag carrier competition—all characterize international air transportation as a separate class of service." *Delta Air Lines, Inc., Mail Rates, Latin American Operations*, C. A. B. Docket No. 6110 Serial No. E-7738, p. 9 (September 21, 1953). **

* See also *Wabash Valley Electric Co. v. Young*, 287 U. S. 488, 497 (1933); *Interstate Commerce Commission v. City of Jersey City*, 322 U. S. 503, 517 (1943); *Boston Consolidated Gas Co. v. Department of Public Utilities*, 327 Mass. 103, 110, 97 N. E. 2d 521, 525-26 (Sup. Ct. 1951); *The Five Per Cent case*, 31 I. C. C. 51, 387, 392, 407-408 (1914); *City of Grand Forks v. Red River Power Company*, 8 P. U. R. (N. S.) 225, 243 (N. D. Bd. Rd. Comm., 1935); *Re Central Arizona Light & Power Company*, 9 P. U. R. (N. S.) 270, 280 (Ariz. Corp. Comm., 1935); *City of Douglas v. Arizona Edison Company*, 1 P. U. R. (N. S.) 493, 498 (Ariz. Corp. Comm., 1933); *Re Detroit Edison Company*, 16 P. U. R. (N. S.) 9, 18-19, (Mich. Pub. Ut. Comm., 1936).

** "It is evident that all of the major foreign airlines here studied have been dependent on public aid in varying degrees and forms." Lissitzyn, *Public Aid to Major Foreign Airlines*, 19 J. Air Law & Commerce, 38, 65 (1952). See also C. A. B. Report, *Administrative Separation of Subsidy from Total Mail Payments to United States International Overseas and Territorial Air Carriers*, pp. 3-5 (June, 1952).

Section 406(b) directs the Board in determining the mail rate to:

“take into consideration, among other factors, * * * the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service and the national defense.”

This is not the language of absolutes. Moreover, the scheme of the Act clearly contemplates the establishment by the Board of reasonable classifications for rate-making and other purposes. Thus the opening sentence of section 406(b) provides that the Board “may fix different rates for different air carriers or classes of air carriers, and different classes of service,” and section 416(a) provides that the Board may “establish such just and reasonable classification or groups of air carriers for the purposes of this title as the nature of the services performed by such air carrier shall require.”

Indeed, Judge Prettyman's dissent below, after pointing out that “the Board clearly had power to fix different rates for international service and for domestic service” (75), stated that “the ‘all other revenue’ which [the Board] must ‘take into consideration’ means revenue related to that service for which the rate is being fixed” (76). And the Board has expressed the same view in a subsequent case involving a similar situation. *Delta Air*

Lines, Inc. Mail Rates, Latin American Operations, C. A. B. Docket No. 6110, Serial No. E-7738, p. 8 (September 21, 1953).

The Court of Appeals focused on the words "all other revenue of the air carrier," and in spite of the other language of sections 406 and 416 found a "plain meaning" depriving the Board of power to consider separately the domestic and international divisions of the carrier, regardless of how cogent the reasons for doing so. But at most, the Act requires the Board "to take into consideration, among other factors," the revenue of the domestic division in fixing a mail rate for the international division. It nowhere compels the Board, after such consideration, to give the domestic revenue any quantitative part in computing the final international rate.

This distinction was pointed out in *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U. S. 604 (1950). There the question presented was whether the Secretary of Agriculture obeyed the requirements of the Sugar Act in allotting the amount of sugar individual refiners could import into the United States. The Sugar Act required the allocation to be made by "taking into consideration" three factors. After due consideration, the Secretary concluded that one of these factors could not properly be applied and therefore gave it no weight in his final determination. The Court of Appeals held that the Sugar Act required the Secretary of Agriculture to give "some effect to each" of the three factors. 171 F. 2d 1016, 1019, (C. A. D. C. 1948). This Court reversed and upheld the action of the Secretary, saying (338 U. S. at 611-12):

"Moreover, he is under a duty merely to take 'into consideration' the particularized factors. The Secretary cannot be heedless of these factors in the sense, for instance, of refusing to hear relevant evidence bearing on them. But Congress did not think it was feasible to bind the Secretary as to the part his 'consideration' of these three factors should play in his final judgment—what weight each should be given, or whether in a particular situation all three factors must play a quantitative part in his computation."

Cf. *McLean Trucking Co. v. United States*, 321 U. S. 67 (1944).

Here there is even less reason to "bind" the Board as to the effect to be given one enumerated factor. Section 406(b) also directs the Board "to take into consideration . . . other factors" than those specifically enumerated in that section. These "other factors" obviously include the general policy provisions found in section 2 of the Act, which apply to rate-making as well as to every other function of the Board. *Mid-Continent Airlines, Inc., Mail Rates* 1 C. A. A. 45, 55 (1939).*

The relationship between section 406(b) and section 2 of the Act was also recognized by this Court in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U. S. 601, 606 (1949).

* See also *Inland Air Lines, Inc.—Mail Rates*, 1 C. A. A. 155, 157 (1939); *Continental Air Lines, Inc.—Mail Rates*, 1 C. A. A. 182, 188 (1939); *Pan American Airways Company—Mail Rates* 1 C. A. A. 220, 254 (1939); *Pan American Airways Company—Mail Rates*, 1 C. A. A. 529, 544 (1940); *Braniff Airways, Inc.—Mail Rate Proceeding*, 2 C. A. B. 555, 582 (1941); *American Airlines, Inc.—Mail Rate Proceeding*, 3 C. A. B. 323, 346 (1942)

These general policy considerations set forth in section 2 of the Act command the Board to consider as in the public interest such factors as the "encouragement and development" of the air transport industry, the regulation of the industry so as to "foster sound economic conditions" and a number of similar factors indicating the broad discretion reposed in the Board.

The decision of the Court of Appeals holds that the Board may not evaluate all the factors expressed by Congress in the Act and decide what weight, if any, to give such factors. Instead, the Court below held that the Board is compelled not only to "consider" one factor to the exclusion of all others, but is also compelled to give that single factor a prescribed quantitative part in its computation of the rate.

The Court of Appeals attempted to support this view by pointing out that in some cases the Board has treated all the operations of an air carrier as a single rate-making unit, citing *Chicago and Southern A. L. Mail Rates—Route No. 8 and 53*, 3 C. A. B. 161, 190 (1941), and *Pan American Airways, Inc., Alaska Mail Rates*, 6 C. A. B. 61, 67 (1944). The Court of Appeals concludes that "Thus we have an established construction of the Act by the Board which should be given weight" (72). What the Court of Appeals refers to as "an established construction of the Act by the Board" was merely an exercise of discretion by the Board in one particular direction. The Board has also exercised its discretion in the other direction. Each case has been judged on its facts. In some cases the Board, after considering all the facts, has decided to treat a carrier's entire operations as one rate-making unit and in other cases it has decided to treat each separate

division of a carrier as a separate rate-making unit.* This has not been inadvertent, but has been done deliberately by the Board. For example, regarding TWA's two divisions, the Board has said:

"In that order [i.e., order issued in 1945 fixing TWA's domestic rate] we specifically provided that the rate was not to apply to the international operation, for which we subsequently in a separate proceeding fixed a temporary rate. This has the effect of a determination that TWA's domestic and international operations are separate units for rate-making purposes." *Pennsylvania Central Airlines Corporation et al., supra*, 8 C. A. B. 685, 703 (1947) *affd.*, 169 F. 2d 893, 336 U. S. 601.

We are dealing here with an Act which empowers the Board to make subsidy grants in order to effect certain broad statutory objectives. Where the Board has found that it would attain the desired objectives by treating an air carrier as a single rate-making unit it has done so. Indeed, it is the Board's stated policy "to treat the entire operations of a carrier as a single unit for rate-making purposes . . . except in those instances in which the characteristics of different operations made the accomplishment of the objectives of the Act feasible only by treating the different operations as separate rate-making units." *National Airlines, Inc.*, C. A. B. Docket Nos. 3037, 3248, Serial No. E-6344, pp. 2-3 (April 21, 1952).

* In instances where conditions change, the Board may decide that two divisions of a carrier previously considered as separate rate-making units shall thereafter be considered as a single unit for rate purposes. See *United Air Lines, Inc.*, C. A. B. Docket Nos. 5683, 2913, Serial No. E-6676, p. 2 (August 7, 1952).

Section 406(b) should not be construed to prevent the Board from thus accomplishing the objectives of the Act.*

POINT II

The decision of the Board to exclude domestic revenues was based on appropriate policy considerations and should not be disturbed by the courts.

The Board has found, both in this case and in subsequent decisions, that domestic profits cannot be offset against the needs of the international divisions of air carriers without doing violence to practically all the major policy considerations which the Board is required to take into consideration (55). See also *Delta Air Lines, Inc. Mail Rates, supra*, Serial No. E-7738, pp. 6-15; *Braniff Final Mail Rate case, supra*, Serial No. E-7815, pp. 8-9. In the latter case the Board summarized the policy reasons as follows:

“We pointed out that the national policy, developed over a considerable period of time, required participation by domestic air carriers in international air transportation, and that such policy would be seriously threatened should the domestic air carriers be required to use the profits of their domestic business to subsidize their international operations. We also noted that an offset policy may adversely affect

* *The Western Air Lines Case* (Nos. 224, 225), consolidated for argument with this case (79, 80), involves the question of the abuse of the Board's discretion rather than its existence. The Court of Appeals held that the Board could not refuse to give any weight to revenues derived from the sale of a route in order to provide an incentive for voluntary route transfers. Whether or not the Court too narrowly viewed the area of the Board's discretion is of no particular significance here on the basic issue of administrative power.

the possibility of improved domestic service and lower passenger and property rates. We expressed concern that a policy which would require the establishment simultaneously of final rates for domestic and international operations may result in substantially longer periods of 'cost plus' operation and higher rather than lower subsidy payments."

"There may be differences of opinion concerning the weight to be given those factors * * *. But their significance is for the [Board] to determine; and, though we had doubts, we would usurp the administrative function of the [Board] if we overruled it and substituted our own appraisal of these factors." *New York v. United States*, 331 U. S. 284, 349 (1947).

The respondents here seek a ruling which at the moment may seem to be in their interest, without consideration of its significance in different cases where respondents' present contentions may rebound against them. See *Re Long Island Lighting Co.*, 18 P. U. R. (N. S.) 65, 213-14 (N. Y. P. S. C., 1935), *affd. sub. nom. Long Island Lighting Company v. Maltbie*, 249 App. Div. 918, 292 N. Y. S. 807 (3rd Dept. 1937).

Consider, for example, what would happen under respondents' theory if Chicago and Southern Air Lines had suffered a substantial loss under a final mail rate on its domestic division during the period for which its mail rate for its international division was to be fixed. Under this Court's decision in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U. S. 601 (1949), the Board would have no power to go back and raise the domestic mail rates. But, under respondents' theory in this case, and the decision below, the Board apparently would be compelled to

give full effect to that domestic loss by increasing the mail rate which would otherwise be fixed for the international division, if that division was considered by itself.

A situation very like this exists with respect to fixing TWA's mail rate for its international division in the pending *Transatlantic Final Mail Rate Case*, C. A. B. Docket No. 1706 *et al.* During the period for which a final past international mail rate is to be fixed in that case, February 5, 1946 to December 31, 1952, TWA contends its domestic division earned a return of about 5.2% on its investment, yet 7% is the rate of return normally allowed by the Board in fixing domestic mail rates for past periods. Under respondents' theory, TWA may seek to have the mail rate for its international division covering that period fixed high enough to account for this 2% deficiency.*

It is interesting to observe that a primary cause of this low domestic return was a 32.38% loss on investment suf-

* In his brief to the Examiner in the *Transatlantic Final Mail Rate Case*, the Postmaster General suggests offsetting the return in excess of 8% earned by TWA on its domestic routes in 1951 and 1952, and completely ignores the prior years when TWA reported a lesser return or suffered a loss. But he does not suggest how such a one-sided view could be justified.

The record in that case (p. 4236) shows the following colloquy between counsel for the Postmaster General and TWA's counsel.

"Mr. Brahm [Counsel for the Postmaster General]: Pending the decision of the Court the Department of course maintains its position, that in determining the subsidy mail pay of one division of a carrier's operation, the Board must offset any excess earnings realized from another division.

"Mr. Rowe [Counsel for TWA]: Does that apply to deficiencies in the past periods as well?

"Mr. Brahm: I was speaking of excess earnings."

ferred by TWA in 1946, which prompted TWA's unsuccessful effort to have its domestic mail rate for that year retroactively increased. See *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, *supra*. Thus, what this Court held the Board could not do directly, it is now asked to hold the Board may do indirectly.

Consider further a situation where a carrier with domestic and international routes earns less than forecast under a final mail rate fixed for its international route. Under the decision below, such a carrier could apparently seek to make up the difference in a pending domestic mail rate proceeding. In short, under the decision below, mail rates for such carriers may never be finally closed and a cost-plus system of rate-making will prevail, in spite of this Court's decision in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, *supra*.

Why, then, do *amici* seek a reversal? First, because the decision introduces an unfair and improper element of chance in the businesses of *amici*. It proposes to take away domestic profits in excess of a certain level accruing during the period the international rates may be open. This would be especially harmful to a carrier which has had a long succession of domestic losses over a period of years, but whose domestic business took a favorable turn and showed good profits during the years for which international rates are to be fixed.

This is a very real problem in the air transport industry which lacks the stability of the more usual forms of public utilities. The Board has pointed out that "there have been substantial variations in airline earnings over the his-

tory of the industry. Although for certain periods they have been what might be considered excessive, over the entire period the average return has not been *prima facie* unreasonable," and "better than average earnings are required in good times to offset less than average earnings in poor times." *General Passenger Fare Investigation, etc.*, C. A. B. Docket No. 5509, Serial No. E-7376, p. 9 (May 14, 1953).

Thus, the application of the offset would depend on the particular point in the business cycle that a mail rate proceeding was commenced. A carrier operating both domestic and international routes could find all the high points of its domestic earnings cycle leveled off by offsets against international losses, with no means of filling in the valleys in domestic earnings occurring in poor years. In every instance where the Postmaster General has alleged "excess" domestic earnings, the claimed amounts are not excesses over any extended period of time, but represent the peaks occurring in a few isolated years during which the air carrier attained better than average earnings. The Postmaster General's position means that where profits are above average they accrue to the government; below-average earnings and losses are to be borne by the carrier.

Second, the decision below imposes an unfair burden on carriers engaged in both domestic and international operations. Domestic carriers which operate international routes are in vigorous competition domestically with other carriers engaged exclusively in domestic air service and whose domestic earnings would not be subject to offset against international losses. TWA, which receives the lowest domestic service rate prescribed by the Board, a

rate devoid of any subsidy, competes with three other large domestic carriers being paid the same mail rate. The purpose of such a uniform rate is to provide incentive, a fact this Court recognized in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, *supra*, 336 U. S. at 606-07:

“Section 406 (b) authorized the Board to fix rates for ‘classes of air carriers.’ It is plain that the uniform rate for the class is an important regulatory device * * *. A uniform rate forces carriers within a given class to compete in securing revenue and in reducing or controlling costs.”

The Board establishes uniform class rates in the domestic field by grouping in one class all of those carriers whose domestic routes are comparable. As previously mentioned, the Board has classified the domestic operations of the nation's carriers into seven groups, and has determined a service rate for each of those groups. For example, in proposing a final mail rate for Braniff, whose domestic operations are in Group II, the Board said:

“it is proposed to fix a rate of 53 cents per mile-ton of mail as the fair and reasonable rate of compensation for Braniff on and after October 1, 1951. This rate, developed by the Board for administrative purposes as the compensatory rate for Group II carriers, including Braniff, was first set forth in the Board's report entitled ‘Administrative Separation of Subsidy From Total Mail Payments To Domestic Air Carriers’ (September 28, 1951) . . . It is the Board's view that the rates shown in the separation report are sound and, at the present time, represent fair and reasonable compensatory rates of mail compensation.” *Braniff Airways, Incorporated*

rated, Domestic Operations, C. A. B. Docket No. 5142, Serial No. E-6257, pp. 8-9 (March 26, 1952). Accord, *Northwest Airlines, Inc., Domestic Operations*, C. A. B. Docket No. 3211, Serial No. E-6717, p. 8 (August 21, 1952).

In theory all carriers in the same group have the same opportunity, they receive the same incentive, and the relative success or failure of each carrier in the group is dependent on its individual initiative in developing revenue and minimizing expense in its domestic service.

But under the Court of Appeals decision equal opportunity would no longer exist because a carrier with both domestic and international routes would have a risk not imposed on other domestic carriers. Carrier A, engaged solely in domestic operations, gets the full return offered to domestic carriers; carrier B, operating purely an international service, is entitled to what it can earn as an international carrier; but carrier C, operating both types of routes and in direct competition with A and B (although perhaps smaller than either), must be satisfied with something less than A and B.

The relative success or failure of C's domestic route under such circumstances would not be the result of its initiative in its domestic operations, but would be substantially determined by the extent to which the carrier was called upon to make up deficiencies in international mail need. Therefore, such a carrier could no longer be grouped with purely domestic carriers and the fixing of mail rates by classes would, for all practical purposes, be impossible.

Finally, the doctrine advocated by respondents will weaken, if not destroy, the incentive for domestic carriers

to continue in international operations.* Consider, for example, the present situation of Braniff which competes internationally with Pan American World Airways and Panagra and domestically with American Airlines on the Chicago-Dallas route. American is appreciably larger than Braniff and operates no system of international routes (other than trans-border "stub-end" routes). American's domestic earnings are, and will be, available for possible reduction in rates on its domestic system and for the acquisition of more deluxe equipment, or for any other competitive attractions which Braniff could not afford if its domestic earnings must first be used to offset losses on its international services. Moreover, effective competition would not be possible if Braniff's passenger and cargo rates were higher than American's, or if Braniff were unable to match any reduction in rates which American might offer to the public. What has been stated above with respect to Braniff applies equally to Northwest, TWA and petitioner, Delta, which also compete domestically with large carriers whose operations are confined to the domestic field.

* "It is not through happenstance that, with the exception of Pan American and Panagra, all United States international air transportation service is rendered by carriers which also operate domestic divisions. Rather, this is the result of a long and arduous policy development participated in by all branches of the Government. Having adopted the policy that the objectives of the Act, the national interest and the public convenience and necessity would best be served by a system of regulated competition in international air transportation in contrast to the so-called 'chosen instrument,' similar considerations have moved the Government to adopt the policy of certifying domestic carriers to perform international services." *Delta Air Lines, Inc. Mail Rates, Latin American Operations*, C. A. B. Docket No. 6110, Serial No. E-7738, p. 10; see also "*Survival in the Air Age*," a Report by the President's Air Policy Commission, pp. 118-19 (January 1, 1948).

These, then, are some of the factors which led *amici* to intervene in this case and which led the Board to refuse, in the exercise of its discretion, to make the offset. As it cannot be said that "the balance" the Board "struck on consideration of all the factors" is one "that a fair-minded tribunal with specialized knowledge" could not have reached, the Board's decision should be affirmed. *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U. S. 604, 614 (1950).

CONCLUSION

The judgment of the Court of Appeals should be reversed and the orders of the Board affirmed.

Respectfully submitted,

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C. EDWARD LEASURE,
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Dated: November 16, 1953

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DEC 8 1953

HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1953.

No. 222

CIVIL AERONAUTICS BOARD, *Petitioner,*

v.

ARTHUR E. SUMMERFIELD, *Postmaster General of the United States*, and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General, *Respondents.*

No. 223

DELTA AIR LINES, INC., *Petitioner,*

v.

ARTHUR E. SUMMERFIELD, *Postmaster General of the United States*, and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General, *Respondents.*

**REPLY BRIEF FOR BRANIFF AIRWAYS, INC.,
NORTHWEST AIRLINES, INC., AND
TRANS WORLD AIRLINES, INC.,
AS AMICI CURIAE**

✓
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Attorney for Trans World Airlines, Inc.

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AS AMICI CURIAE**

The respondents assert a strained and unreasonable interpretation of this Court's opinion in *Transcontinental & Western Air, Inc., v. Civil Aeronautics Board*, 336 U.S. 601 (1949). They assert that the TWA case involved only a service mail rate, that the subsidy provisions of section

406(b) were not involved and that the rules in "traditional rate proceedings" are inapplicable to mail rates set by the Board because of the subsidy feature (Res. Br. pp. 13, 29-30).^{*} This sidesteps the issues in the *TWA* case.

The proposal in the *TWA* case was that a *subsidy* rate be established prior to March 14, 1947, the date of the carrier's petition for rate revision. In that case the carrier argued that "Actually mail pay is 'Government subsidy in the form of mail pay'", citing the Annual Report of the Civil Aeronautics Board, 1947, p. 5, and referring to a number of Board decisions. The carrier contended that because of the subsidy feature embodied in the need provision of section 406(b), the Act was not "a traditional regulatory public utility statute" (*TWA* Br. pp. 28-9).^{**}

In striking contrast to the view now urged, the government brief in the *TWA* case took the position that "the Act establishes a public utility rate-making pattern for the determination of compensation for carrying mail by air" (Govt. Br. p. 46) and that the subsidy provision of the Act "does not change the rate-making method for determining mail pay" (Govt. Br. p. 28).

Thus the subsidy feature was a major issue. This Court specifically noted in the *TWA* case that the petitioner had placed "Considerable reliance" on the need provision of section 406(b) of the Act, but held that "such a standard has its counterparts in other legislation dealing with rate making . . ." The Court concluded that "The language of the Act does not suggest that Congress intended to break

^{*} "The *TWA* case held only that the Board has no power under section 406(a) of the Act retroactively to revise a closed domestic *service* rate for the period prior to the filing of a petition to fix a new rate. This Court did not decide any of the broader issues as to subsidy under Section 406(b) which the instant cases present, and to which different policy considerations are applicable," (Res. Br. p. 13, emphasis in original). See also numerous references to "service" rate at pages 38-40 of respondents' brief.

^{**} We refer to the petitioner's brief in the *TWA* case, as "*TWA* Br." and the brief of the respondents in that case as "*Govt. Br.*"

with these traditions of rate-making" and "The other rate-making provisions of the Act likewise follow the conventional pattern" (336 U.S. at 604, 5).

Respondents reveal the full conflict between their position and this Court's decision in the *TWA* case when they argue (Res. Br., pp. 29-30):

"The Board's contention (Br. 38) that the decision below denies it the traditional authority of rate-making bodies to establish separate rate-making units and to set rates at a level which will sustain the particular unit confuses the issues in rate making with those in the awarding of subsidy."*

It was just this alleged distinction between traditional rate making and subsidy rates that this Court refused to draw in the *TWA* case. The respondents' argument here is nothing more than an expansion of the dissent in that case. See 336 U. S. at 609 (dissenting opinion).

The respondents further reveal their misunderstanding of the *TWA* decision and the operation of the Act when they assert that a mail rate "guarantees" a carrier a certain minimum return (Res. Br. pp. 10, 19, 44). There is no such guarantee. Indeed, in the *TWA* case the government brief on this point also was contrary to what is now urged, arguing that rates fixed by the Board "afford an opportunity to earn a fair return but do not guarantee that such a return will, in fact, be earned." (Govt. Br. pp. 34, 97) The argument then, which prevailed in this Court, was that once a rate was set, losses or profits were for the carrier's own account.**

* Respondents cite as authority for this view the decision of the Board in *Pan American Airways Co., Transatlantic Mail Rates*, 1 CAA 220, 252-253 (Res. Br. p. 30). This was one of the cases unsuccessfully relied on by the petitioner in the *TWA* case (*TWA* Br. pp. 29-30).

** The government brief in the *TWA* case pointed to the fact that the Board had estimated, when it set *TWA*'s domestic mail rates in 1945, that *TWA* would earn a return of 13.77 per cent

(continued on page 4)

The respondents' discussion of the *TWA* case concludes with this startling declaration:

"The issue in awarding subsidy, however, is not the fairness of compensation for carrying the mail, but the extent of the carrier's need. And since the need is that of the carrier as a whole, the carrier's total subsidy requirements for the period involved can be finally determined only when both domestic and international subsidy proceedings have been completed." (Res. Br. p. 40)

If this last statement is true, the domestic mail rates of TWA for most of 1946 and up to March 14, 1947 are subject to review and adjustment despite the contrary holding by this Court in the *TWA* case.

This follows because TWA's international "subsidy proceedings" involving the period beginning February 5, 1946 to date have not been "completed". As explained in our main brief, TWA's international mail rates have been on a temporary basis since February 5, 1946, when its international service was inaugurated. If TWA's "need is that of the carrier as a whole" and if "the carrier's total subsidy requirements for the period involved can be finally determined only when both domestic and international subsidy proceedings have been completed", then TWA is entitled to have its *domestic losses* in 1946 and early 1947 taken into account in determining its "need" in the pending international mail rate case.

This is directly contrary to what this Court held in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601, when TWA was denied the right to any increase in its rates on account of domestic losses prior to March 14, 1947. Moreover, in that case TWA had requested the Board to consider the "need of the carrier as

and that "Such a high rate of return is wholly inconsistent with the lack of risk involved in the petitioner's view that the Board is required to guarantee fair and reasonable amounts of mail compensation . . ." (Govt. Br. p. 39).

a whole", but this was rejected by the Board on the grounds that the Board had determined that "TWA's domestic and international operations are separate units for rate-making purposes" and TWA's domestic rate could not be revised prior to the date it was "challenged by the institution of a proceeding looking toward its revision".*

The respondents now contend that the making of a system-wide rate for TWA was an issue "not presented to this Court" (Res. Br. p. 39). Respondents further argue that when the Board in the *TWA* case stated that TWA's domestic and international operations were separate units for rate-making it "obviously was not purporting to decide how much subsidy TWA ultimately would need in its international operations" (Res. Br. p. 39).

The position of the respondents apparently is this: Although this Court held, in a case involving TWA's domestic rates, that the carrier could not have its domestic rates increased to recoup domestic losses incurred in 1946 and early 1947, the carrier can recoup such losses in rates to be set for its international operations. In brief, the respondents argue that the *TWA* case was an academic exercise.

This Court's opinion in the original *TWA* case was rendered in 1949, over four years ago. The opinion held that a carrier's domestic rate was closed for the period prior to the date it was challenged by the "initiation of a mail rate proceeding." The Court stated that a contrary conclusion would "have the tendency to transform [the Act] into a cost-plus system of regulation, a construction which would not harmonize with the apparent design of the Act." *Amici* submit that it would be manifestly unfair to make an "end run" around that decision and reopen domestic rates in the guise of fixing international rates.

* Transcript of record, No. 387, October Term, 1948, pp. 88-90. The Board also stated:

"TWA points out that it commenced operations on its international routes on February 1, 1946, and asks for a review of its system rates at least back to that date."

Conclusion

The judgment of the Court of Appeals should be reversed and the orders of the Board affirmed.

Respectfully submitted,

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Dated: December 8, 1953

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JUL 31 1953

HAROLD B. WILEY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1953

No. **223**

DELTA AIR LINES, INC., *Petitioner,*

v.

ARTHUR E. SUMMERFIELD, Postmaster General of the
United States, and **THE UNITED STATES OF AMERICA,** on
behalf of the Postmaster General, *Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT.**



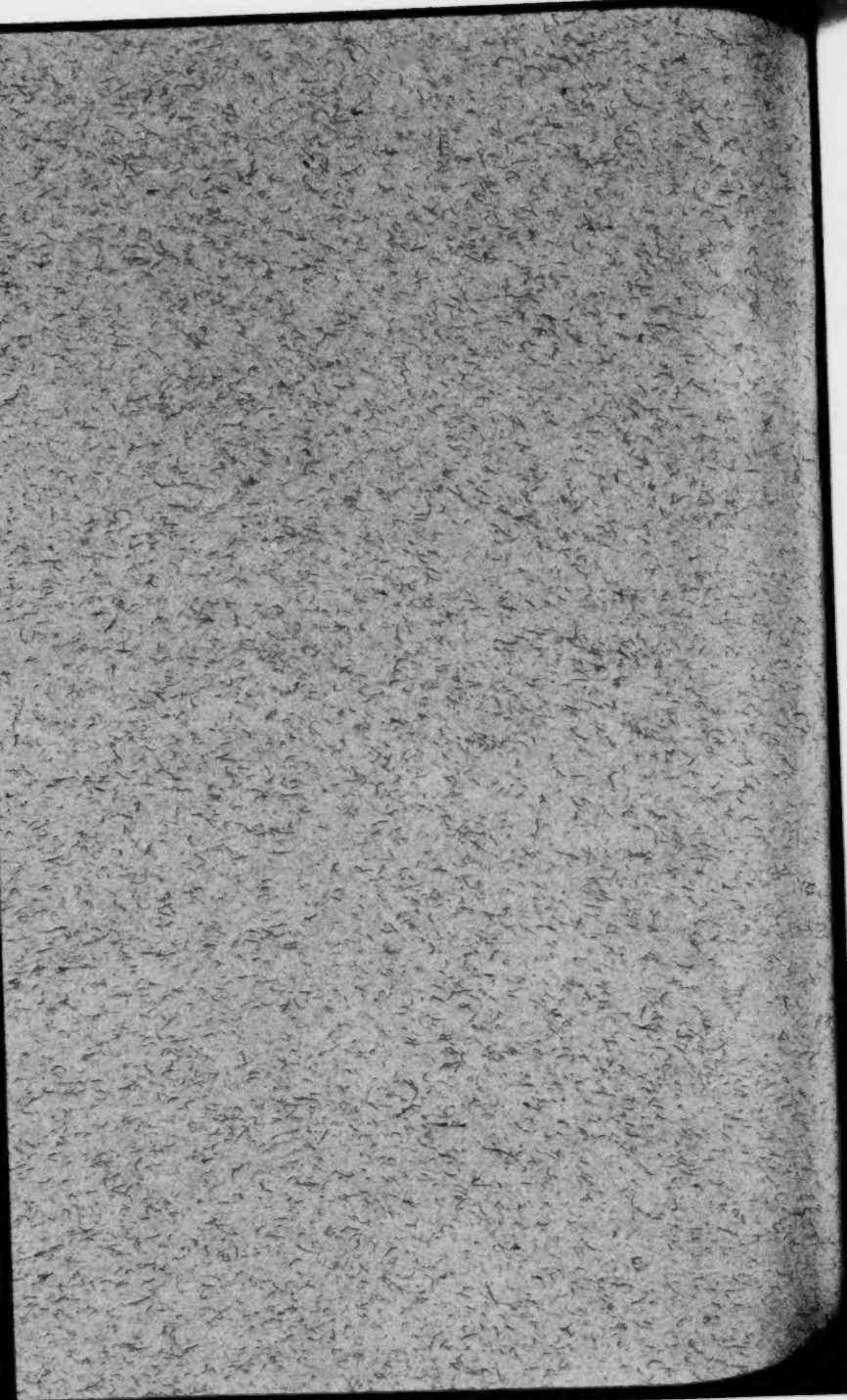
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No.

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ARTHUR E. SUMMERFIELD, Postmaster General of the
United States, and THE UNITED STATES OF AMERICA, on
behalf of the Postmaster General, *Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT.**

Delta Air Lines, Inc., Petitioner herein (substituted as a party Intervenor for Chicago and Southern Air Lines, Inc. (R. 79), Intervenor below, by reason of a corporate merger in which Petitioner was the continuing corporation) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in *Arthur E. Summerfield, Postmaster General of the United States, et al v. Civil Aeronautics Board, et al*, No. 11351, on May 4, 1953.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 68) is not yet reported. The

opinion of the Civil Aeronautics Board (R. 51) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 4, 1953 (R. 78). The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1) and Title 49, United States Code, Section 646(f).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Act does, or does not, authorize the Civil Aeronautics Board, where the domestic operations and the international operations of an air carrier engaged in both had been determined by the Board to be separate classes of service for rate making purposes, to offset any of the revenues derived from the carrier's domestic services during a past three-year period of final and closed air mail rates against such carrier's requirements for compensation under the Act in its international operations for which air mail rates were being fixed retroactively for such period in the proceeding here in question.

2. Whether, if the answer to Question 1 is in the affirmative, the Board may exercise its discretion as to whether or not, for reasons of public interest, any such possible offset of revenues derived from the carrier's domestic class of service shall be made in whole or in part, or not at all, in fixing air mail rates for the carrier's international class of service.

3. Whether the decision below by the Court of Appeals effects a recapture of earnings of the air carrier under a closed rate in its domestic class of service contrary to the construction of the mail rate provisions of the Civil Aeronautics Act laid down by the United States Supreme Court in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U. S. 601 (1949).

4. Whether the Board, in fixing mail rates for an air carrier may give weight to rate-fixing policies desirable in the public interest for the air transportation industry as a whole and, therefore, for the particular air carrier (for which rates are being fixed) as an integral part of such industry.

STATUTES INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,¹ which will be referred to as the Act, are set forth in the Appendix hereto.

STATEMENT

Chicago and Southern Air Lines, Inc. (hereinafter called "C&S") during the period relevant to this case conducted domestic air transport operations over routes extending between Chicago and Detroit, on the one hand, and Houston and New Orleans, on the other, and international air transport operations over routes extending between the two last mentioned cities and Caracas, Venezuela via Havana and Kingston. The certificates of public convenience and necessity for both operations authorize the transportation of mail, persons, and property. This case concerns the fair and reasonable rates of compensation for the transportation of mail to which C&S is entitled under the Civil Aeronautics Act for transporting mail by aircraft in its international operations during the period from January 1, 1948, to December 15, 1950.

The Board, in July 1948, fixed, among other things, final mail rates effective January 1, 1948, for the air transport operations of C&S² over its domestic air transport routes

¹ Act of June 23, 1938, c. 601, 52 Stat. 977, as amended, 49 U.S.C. 401, *et seq.*

² Chicago and Southern Air Lines, Inc., has since merged with Delta Air Lines, Inc., by statutory corporate merger, Delta being the surviving corporation. Delta has been substituted as an Intervenor herein subsequent to the decision of the Court of Appeals (R. 79).

(appropriate allocations having been made by the Board of costs and investment between the domestic and the international air services of C&S.) This decision of the Board is reported in *Chicago and Southern Air Lines, Inc., Mail Rates*, 9 C.A.B. 786. The final rates so established in that case for the domestic routes of C&S remained in effect and unchallenged by the Postmaster General or anyone else during each of the years 1948, 1949, and 1950. Those rates were fixed on a sliding scale related to the percentage of passenger seats occupied to seats available (load factor) and were estimated by the Board to produce varying rates of return after taxes upon the C&S investment allocated by the Board to the domestic air services. The Board's actual language in showing these estimated rates of return and certain other possible earnings which it approved is quoted in the footnote.³

³ . . . The operating income per revenue plane mile before Federal income taxes, and the rate of return on recognized investment after income taxes at 38 percent, for various load factors indicated, are presented below.

Revenue passenger load factor	Operating income before income tax, per revenue mile	Percent return on recognized invest- ment after income taxes at 38%
Percent	Cents	Percent
50	—3.85	(¹)
55	3.87	3.6
60	7.90	7.3
65	11.03	10.2
70	14.16	13.1

¹ The loss of 3.85 cents per revenue mile is equivalent to a loss of 5.7 percent on recognized investment, without allowance for Federal tax credits.

From the above tabulation, it appears that C&S under honest, economical, and efficient management may be expected to earn a rate of return, over an annual period, of 7.3 percent, with a 60 percent annual revenue passenger load factor. At the forecast passenger load factor of 60.09 percent, the estimated rate of return

Subsequently, and in a separate proceeding from that in which the final rates for the domestic routes were fixed, the Board, on October 18, 1951, fixed final mail rates for the air transport operations of C&S over its international routes, retroactively for the period from November 1, 1946 to December 15, 1950, and prospectively from December 16, 1950 (R. 51). It is this proceeding for the fixing of the mail rates for the international services which is now before the Court.

The Postmaster General filed objections to the Board's Tentative Findings and Conclusions in the proceeding on the mail rates for the international routes, and also filed a Petition for Reconsideration of the Board's final order therein, in which he contended that the Act required the Board to offset against the mail pay to be received on the C&S international routes for the past period 1948-1950, the amount by which C&S's net profits on its domestic routes under the forecasted passenger load factor during the same period had exceeded a 7.4% rate of return on investment. C&S had averaged a 12.51% annual rate of return on its domestic operations for those years. The Postmaster General argued that the difference between a 7.4% return and the 12.51% return (approximately

after taxes is 7.4 percent. It should be noted that with an average annual passenger load factor of 60 percent, the average base mail rate will amount to 29.8 cents per airplane mile, but the average effective mail rate will amount to approximately 26 cents per revenue plane mile flown.

An extra cushion against unforeseen developments will be provided to the extent that C&S succeeds in developing additional revenues from express, freight, and incidental sources above the level forecast for the future period. Similarly, any economies which the carrier's management succeeds in accomplishing through effective cost controls or improved operating procedures and techniques, which serve to avert or mitigate anticipated increases in prices and to decrease operating costs below the unit cost of 116.6 cents per revenue plane mile estimated herein, will inure to the carrier in the form of higher earnings." *Chicago and Southern Air Lines, Inc., Mail Rates*, 9 C.A.B. 786, 812 (1948).

\$654,000 for the three years 1948-1950) constituted "excess profits" of the domestic services of C&S and was "other revenue" which, under Section 406(b) of the Act (see the Appendix hereto), was, as a matter of law, required to be applied in reduction of the amount of "need" of the air carrier determined by the Board for the international services.

C&S opposed these contentions, urging, *inter alia*, that by the explicit terms of the Board's Order, to which the Postmaster General made no objection, the Board's findings in its opinion fixing the C&S domestic rates were not intended to, and did not, impose a ceiling on the earnings of C&S's domestic division and that the Act neither required, nor permitted, the offset proposed by the Postmaster General.

The Board in its final opinion in the proceeding fixing the C&S international rates, issued October 18, 1951 (R. 51), rejected the Postmaster General's contention, saying, *inter alia*, ". . . we believe that we are not required by Section 406(b) to reduce the carrier's mail pay with any part of such other revenue if there are sound reasons for not doing so as a matter of economic policy" (R. 54). The Board did not pass upon its power to make such an offset (R. 55) but concluded that, for the reasons of public policy set out in detail in its final opinion, the offset contended for by the Postmaster General should not be made.

On appeal by the Postmaster General, the court below held (Judge Prettyman dissenting) that the Board was required by Section 406 of the Act to offset, against the amount of mail compensation determined to be required for the international services, the so-called "excess profits" on the carrier's domestic services during the 1948-1950 period.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding that the Civil Aeronautics Board, in fixing air mail rates for an air carrier for its international services as a separate class of service and as a separate rate-making unit from the domestic services of the carrier, was required by Section 406 of the Civil Aeronautics Act to offset any of the carrier's earnings on the domestic services against the carrier's "need" for mail compensation on its international services;

(2) In holding that the direction of Section 406 of the Act to the effect that the Board, in fixing air mail rates for a particular class of the carrier's services, shall take into consideration the "need" of the carrier for certain developmental purposes includes a requirement that the Board go outside such class of service and ascertain whether there are any other revenues of the air carrier arising in some other class of service which could possibly be so offset;

(3) In quoting the statute to the effect, and in holding, that it is the duty of the Board under Section 406 of the Act, in fixing air mail rates, "to 'take into consideration, among other factors, . . . all other revenue of the air carrier' ". (Page 5 of Opinion of the Court below, R. 72);

(4) In holding that Section 406 of the Civil Aeronautics Act does not vest discretion in the Board as to the extent if any to which, in fixing air mail rates for an air carrier's international class of services, it will offset against the carrier's "need" for air mail compensation for such services certain other revenue of the carrier derived from its domestic class of services;

(5) In holding that Chicago and Southern had received excess earnings on its domestic services;

(6) In holding that the Board's determination was unlawful insofar as it gave effect, for reasons of public interest, to rate fixing policies of importance to the air trans-

port industry as a whole in fixing the rates of a single carrier which is an integral part of that industry;

(7) In holding that as a matter of law the Board was authorized, and required to effect a recapture of passings of an air carrier on its domestic services under the domestic mail rates which had long been closed and with respect to which no proceeding was pending, by offsetting its earnings against the carrier's "need" for mail compensation on its international services, in a subsequent proceeding in which the only issue was the fixing of mail rates on the international services; and

(8) In setting aside the order of the Board.

REASONS FOR GRANTING THE WRIT

1. **The Court Below, in a Divided Decision, Has Adopted a Construction of a Statute of the United States of Wide Importance, Which Construction Will Have Immediate Importance Far Beyond the Particular Facts of the Parties Involved and Will Have a Continuing Effect on Important Considerations of Public Interest and National Policy.**

A divided court below has created a national policy. The majority may not have realized this. There is no discussion of it in the opinion. If the Civil Aeronautics Board is forced to follow the decision below, the result soon later will be to drive domestic air carriers out of substantial international operations into which several of them have been certificated during the last ten years under a carefully developed national policy.⁴ Thus the n

⁴ TWA, a domestic air carrier, was issued a certificate for routes across the North Atlantic to Europe and to Africa and to the Orient. Braniff Airways, a domestic air carrier, was issued a certificate for a route from the United States through the Caribbean and down the west coast of South America to Rio Janeiro and Buenos Aires. Northwest Airlines, a domestic air carrier, was issued a certificate for routes from the United States across the North Pacific to points in Asia. Chicago and S

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air policy of the United States as it concerns international operations of United States air carriers will be seriously affected and the so-called "chosen instrument," i.e., one United States international air operator, not engaged in domestic air operations, is apt to be left alone in the field, in the status it enjoyed during the infancy of international air services and before the development of such national air policy. This result will follow, not as a result of national policy determinations (which have been to the contrary) but because of the decision below by two Judges.

This result will follow because domestic air carriers engaged in both domestic and international air operations must compete domestically with other domestic air carriers who are not engaged in international operations. If those who do so compete are to have their domestic earnings siphoned off to subsidize the admittedly economically weaker (R. 54) international operations, good business sense, as well as survival domestically, will move them out of the international field.⁵

Air Lines (now Delta), a domestic air carrier, was issued a certificate for routes from the United States to Carribbean points and the North coast of South America.

Detailed statements of the reasons underlying the policies adopted by this Government with respect to its international air transport system are set out in the following: *Hearings Before the Subcommittee on Aviation of the Committee on Commerce, United States Senate 79th Congress, 1st Session, on S. 326; Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Congress, 1st Session, on Bills Relative to Overseas Air Transportation; Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, 80th Congress, 1st Session, on S. 987; American Export Airlines, Trans-Atlantic Service, 2 C.A.B. 16, Northeast Airlines, et al, North Atlantic Route Case, 6 C.A.B. 319; "Survival in the Air Age," A Report by the President's Air Policy Commission, January 1, 1948, pages 118-119.*

⁵ This applies to all international routes operated by domestic air carriers where the international routes are substantial compared to the total operations of the carrier.

This alone justifies and requires the Supreme Court to review this case and direct the proper course under the federal statutes in question.

The offset between the international "need" and domestic earnings of an air carrier required by the majority of the Court of Appeals will place the air carrier operating both international and domestic services in such a position that it not only loses its incentive to continue operating international services but also has its competitive position in its domestic services seriously impaired. As noted earlier, the international services are economically weaker than the domestic. Therefore, the air carrier can only look forward in the indefinite future, under the Court of Appeals decision, to a constant draining off of its domestic earnings for the financial support of its international operations. Domestic air carriers operating international routes compete domestically with air carriers engaged exclusively in domestic services whose domestic earnings are not subjected to such diversion. Under such circumstances the air carriers operating both types of service could not maintain the same level of domestic earnings as their competitors and necessarily would compete at a great disadvantage. In such a situation, the air carrier's alternative is to withdraw from international operations in order to maintain its competitive position in the larger domestic market.

Other public interest objectives which the Board has found to exist with respect to domestic air services also would be jeopardized under the decision of the court below.

The increasing public acceptance of air transport in recent years has made it possible for the Board to place a substantial number of domestic air carriers on uniform service mail rates for domestic services without including any element of subsidy payments. Necessary further improvements in earnings can open the way for reductions in passenger and cargo rates, increases in the volume of air coach services, and other benefits to the public.

But the offset doctrine advanced by the Court of Appeals would submit the domestic operations of the domestic air carriers operating international services to the debilitating financial drain of subsidizing their international services. The effect of this is particularly critical because, as noted above, a substantial proportion of the domestic services are on uniform service mail rates. Furthermore, it is axiomatic that domestic passenger and cargo rates must, for competitive reasons, be substantially the same as between carriers. Consequently, the air carriers operating both domestic and international services cannot, under the principles laid down by the Court of Appeals, maintain the same level of domestic earnings under uniform domestic mail rates as can its domestic competitors who have no international services to which their earnings must be diverted. Under such circumstances, the more limited level of domestic earnings of those carriers which operate both types of service would provide a higher floor to domestic passenger and cargo rates than would otherwise be the case—unless, alternatively the Board should increase the domestic mail rates of such carriers to make up their earnings deficiencies. In either event, public advantages inherent in lower passenger and cargo rates or in uniform mail rates are adversely affected.

The Civil Aeronautics Board in its mail rate proceedings has classified the international and domestic services of a single air carrier as different classes of services for rate-making purposes, as authorized by Section 406 of the Act, and has thus treated such services as constituting separate rate making units.⁶ On this premise it has not offset earnings between the two classes of services. The Board has thereby geared its rate-making process to the preservation of the basic conditions believed by it to be essential to the support of the public interest objectives described above.

⁶ It has done this in all cases where the international services were substantial as compared to the total operations of the air carrier.

The court below says that the Board was in error in that respect. The reversal by the divided court below of this well established construction of the statute by the Board, which will result in widespread public dislocations in the field of international air operations, justifies the Supreme Court in granting the requested review.

2. The Decision of the Majority of the Court Below Establishes a Construction of the Civil Aeronautics Act Which is in Direct Conflict With the Decision of the Supreme Court in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601 (1949).

The principles laid down by the decision of the court below are directly contrary to those laid down by the Supreme Court in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601 (1949). In that decision, this Court held that in fixing mail rates for air carriers the Board was without statutory authority to revise an air carrier's mail rates retroactively to a date prior to the institution of the rate proceeding. In the present case, however, the court below holds that the statute authorizes the recapture of the earnings made by C&S for a past period under final domestic mail rates which were closed and with respect to which no proceedings for review were pending.

Final domestic mail rates for C&S were fixed by the Board in July 1948, effective January 1, 1948, and these rates remained in effect and unchallenged, with no proceeding pending seeking their revision, during each of the years 1948, 1949, and 1950. The earnings of C&S during those years fell well within the allowable rate of return established by the Board's incentive scale (see footnote 3, *supra*). In the present case, involving a proceeding instituted only for the purpose of fixing international mail rates for C&S, two of the three judges in the Court of Appeals hold that the Board, in issuing its order of October 18, 1951, fixing only the international rates, must offset against those rates, and in effect recapture from the

carrier, earnings under its closed domestic rates during the years 1948, 1949, and 1950. This clearly violates the holding in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, *supra*, that the statute does not authorize the review of closed rates.

The direct nature of the conflict between the decision of the court below and the *TWA Case* is shown clearly by the existing situation with respect to TWA's own mail rates. In the *TWA Case* the Court had before it a Board proceeding arising on a Petition filed by TWA on March 14, 1947 asking for an increase in its domestic mail rates effective from January 1, 1946. The Board held that it was without power to revise TWA's domestic rates for the period prior to March 14, 1947, and the Supreme Court affirmed. However, TWA's international mail rates for the period since February 5, 1946 are now still open in another proceeding pending before the Board. A logical application of the Court of Appeals decision would require that the same domestic rates of TWA for the same period which the Supreme Court said were beyond the Board's power to review directly in the original *TWA Case*, now must be reviewed indirectly in the process of retroactively offsetting earnings of TWA's domestic services against its international "need" during that period. No financial stability, no accurate credit rating, no stable balance sheet position, no dividend policy, and no ability to raise private capital can struggle through such quicksands as are piled up by the decision of the court below.

The decision of the court below erroneously sanctions a cost-plus system of rate fixing contrary to the basic concepts of the statute which the Supreme Court enunciated in the *TWA Case*. If all closed rates are to be reviewed in finalizing an open class of service rate, there is no incentive to do well under the closed rate. In reaching its conclusion in the *TWA Case*, the Court expressed the view that:

"Petitioner's reading of the Act would in practical effect have the tendency to transform it into a cost-

plus system of regulation, a construction which would not harmonize with the apparent design of the Act . . .". (336 U. S. at p. 606).

Under the principles of the decision of the court below, the air carrier operating both international and domestic services can find its entire system rates for both classes of service subject to adjustment long after the domestic rates have been closed. Under such a regime all incentive to economy and efficiency in domestic operations is lost. The Post Office Department in fact is currently contending, in certain mail rate proceedings now pending before the Board and involving the future rates of such air carriers, that the Board must implement the Court of Appeals decision by setting up mechanics whereby offsets will be automatically made in the future between domestic and international earnings or whereby earnings above some minimum level otherwise will be immobilized.

3. The Decision of the Majority of the Court Below is Directly Contrary to the Well-Established Construction of the Civil Aeronautics Act by the Civil Aeronautics Board.

A question of interpretation of the Civil Aeronautics Act is involved which the court below has resolved by rejecting a methods of rate-fixing which has been consistently followed by the Civil Aeronautics Board in fixing mail rates for an air carrier operating both domestic and international air services.

The decision of the majority of the court below rests on an extremely narrow, clearly unjustified, and erroneous interpretation of the Board's rate-fixing powers under the statute. While the court concedes, as it must, that the statute expressly authorizes the Board to fix different mail rates for different classes of service, the court denies any substance to that grant of authority by ruling that in fixing the rate for one class of service the Board must consider, and include in its computation, the earnings from all classes of service operated by the carrier. Such a qualification

upon the power to fix different rates for different classes of service makes the statutory grant of power meaningless.

As Judge Prettyman observes in his dissenting opinion below, the concept of fixing different rates for different classes of service clearly contemplates that a rate for a particular class of service may be fixed upon the basis of the revenues, expenses, and other factors relating to that class of service and no other service.

The court below in undertaking to quote a portion of the statute left out certain words necessary to convey its proper meaning and thus reveals one way in which the court erred. The majority opinion says, in effect, that the court thinks it is "the duty of the Board in fixing 'fair and reasonable rates of compensation' under § 406(b) in each case to 'take into consideration, among other factors, . . . all other revenue of the air carrier' ". (R. 72, second full paragraph on the page.) This quotation suggests offset to the mind. The statute properly quoted does not. Section 406(b) provides (see the Appendix hereto) that in determining the rate in each case the Board "shall take into consideration, among other factors, . . . the need of each such air carrier for compensation for the transportation of mail sufficient . . . together with all other revenue of the air carrier, to enable such air carrier . . . " (emphasis added) to accomplish certain important developmental objectives as revealed by the full language of Section 406(b) of the Act. As Judge Prettyman said in his dissent below:

" . . . It is noteworthy that the statute does not describe need as the remainder after all other revenue is deducted. The statute does not speak of offsets or deductions. The statute is affirmative in its prescription. It speaks of compensation which 'together with' all other revenue will enable the carrier, etc. This is language appropriate to a measure of discretion in respect to the particular carrier and to the particular service . . . " (R. 77).

The whole statutory emphasis is upon meeting the developmental need. The reference to "other revenue" is entirely incidental thereto. Obviously, a discretionary concept, rather than one of mandatory offset, is intended. The language simply cannot be quoted grammatically in the manner attempted by the court below.

The court below refuses to recognize that the statute authorizes the Board to give weight to overall public interest objectives in fixing mail rates and in determining rate-fixing methods. Although the opinion of the Board in this case describes in detail the public interest considerations which have lead the Board to conclude that mail rates for domestic and international services should be fixed as separate rate-making units without offset of earnings between them (R. 19-21; and 54-55), the court below, without denying the existence and force of these considerations, holds that the Board was not authorized by the statute to give weight to them in fixing the carrier's international rates. The court's conclusion clearly is inconsistent with the language of Section 2 of the Act (see the Appendix hereto) and with the language of Section 406 of the Act which directs and authorizes the Board to take into account broad considerations in fixing mail rates. For example, the first sentence of Section 406(b) provides:

"In fixing and determining fair and reasonable rates of compensation under this section, the Board, *considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers*, may fix different rates for different air carriers or classes of air carriers, and different classes of service". (emphasis added).

A subsequent portion of Section 406(b) provides that:

"In determining the rate in each case, the Board shall take into consideration, among other factors, . . . the need of each such air carrier for compensation for the transportation of mail sufficient to insure the per-

formance of such service, and, together with all other revenue of the air carrier to enable such air carrier under honest economical, and efficient management, to *maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.*" (emphasis added).

Such broad statutory directives clearly authorize the Board to frame its rate-fixing method in this case upon the basis of the considerations of public interest which the Board in its opinion found were applicable to this case.

CONCLUSION

The decision by the divided court below will change, importantly, if not reverse completely, the national policy of the United States developed during a long period of careful consideration which has placed a number of domestic air carriers in the field of international air operations; that decision is inconsistent with the principles and the decision laid down by the Supreme Court in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U. S. 601 (1949) forbidding the review of closed rates and repudiating the theory of a cost-plus system of rate fixing; and that decision over-ruled well-established constructions of the Civil Aeronautics Act affecting the broad public interest placed upon the Act by the administrative agency charged with its administration.

The importance of the air transportation system of international and domestic services to the national defense and to the public interest of the nation generally is universally accepted. The decision of the court below in a divided opinion so importantly and adversely affecting areas of broad public interest as referred to above, should not be permitted to stand without review by the Supreme Court.

WHEREFORE, Petitioner prays that a writ of certiorari

issue with a view to causing the decision below to be reviewed by this Court.

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APPENDIX

The Civil Aeronautics Act of 1938, 52 Stat. 977, as amended, 49 U.S.C. 401, *et seq.*, provides in part as follows:

“Declaration of Policy

“SEC. 2 [52 Stat. 980, 49 U.S.C. 402] In the exercise and performance of its powers and duties under this Act, the [Board] * * * shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.”

* * * *

“Rates for Transportation of Mail

“Authority to Fix Rates

“Sec. 406 [52 Stat. 998, 49 U.S.C. 486] (a) The [Board] * * * is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith * * * by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

“Rate-Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the [Board] * * *, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the [Board] * * * shall take into consideration, among other factors, the conditions that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.”

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FILED

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HAROLD B. WILLEY, Clerk

IN THE
Supreme Court of the United States

October Term, 1953

No. 223

DELTA AIR LINES, INC., *Petitioner,*

v.

ARTHUR E. SUMMERFIELD, *Postmaster General of the United States, and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General, Respondents.*

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

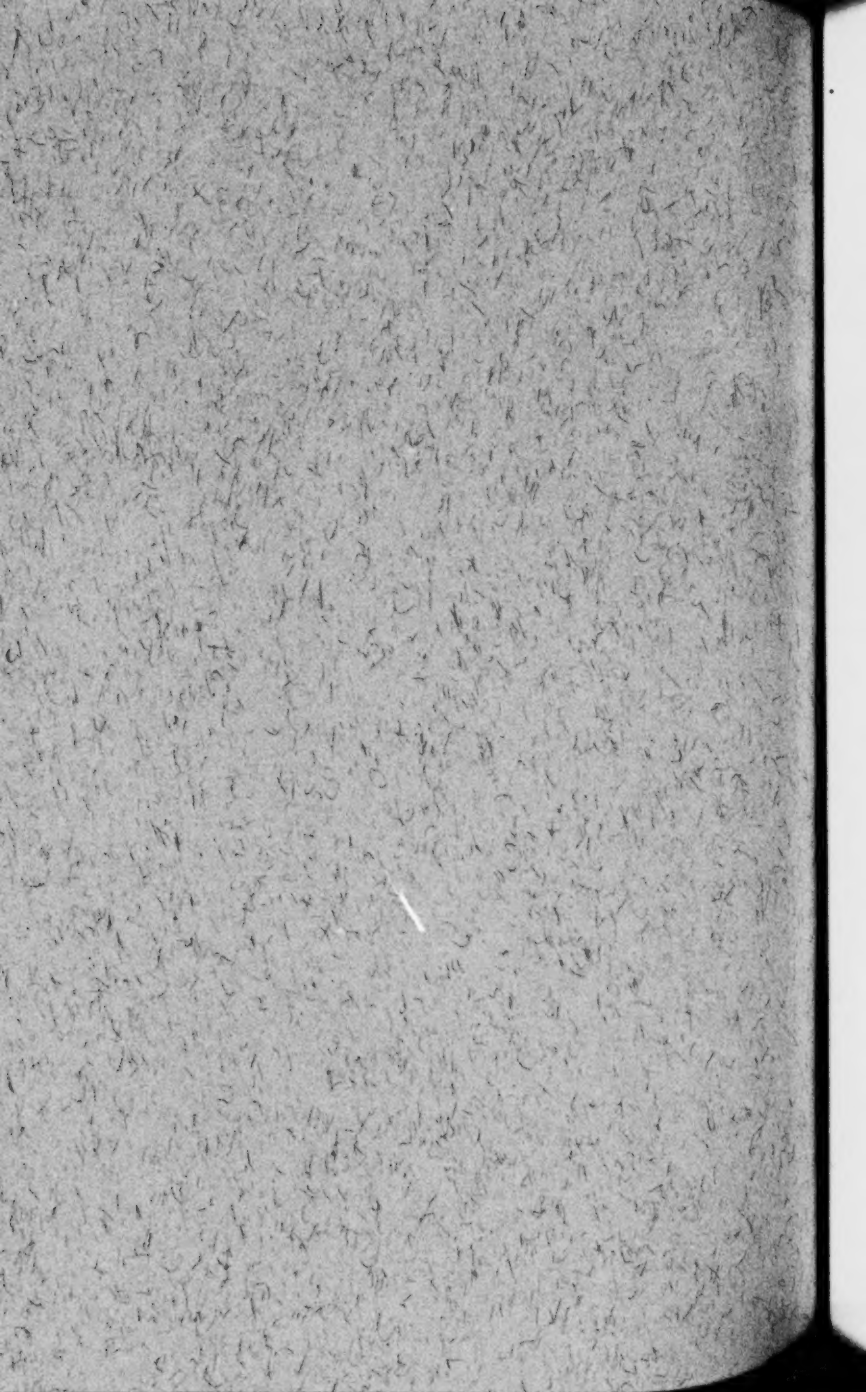
BRIEF FOR THE PETITIONER

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October Term, 1953

No. 223

DELTA AIR LINES, INC., *Petitioner,*

v.

ARTHUR E. SUMMERFIELD, *Postmaster General of the United States*, and THE UNITED STATES OF AMERICA, on behalf of the Postmaster General, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 68-76) is not yet reported. The opinion of the Civil Aeronautics Board (R. 51-60) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1953 (R. 77). Petitions for a Writ of Certiorari were filed July 31, 1953, by the Civil Aeronautics Board (No. 222) and by the Petitioner (No. 223). The Acting Solicitor General subsequently filed a Memorandum in which he stated that he did not oppose the granting of the writ. The writ was granted October 12, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 49 U.S.C. 646 (f).

QUESTIONS PRESENTED

1. Whether, when the domestic and international operations of the same air carrier have been classified as separate rate-making units, the Board is empowered by the Civil Aeronautics Act to apply any of the revenues derived from the carrier's domestic services during a past three year period of final and closed air mail rates in reduction of such carrier's requirements for compensation under the Act on its international division, in a proceeding where air mail rates for such international division are being fixed retroactively for the same period.

2. Whether, if, contrary to Petitioner's contention, the answer to Question 1 is in the affirmative, the Board may exercise its discretion as to whether or not, for reasons of public interest, any such possible application of revenue derived from the carrier's domestic division shall be made in whole or in part, or not at all, in fixing air mail rates for the carrier's international division.

3. Whether the decision below by the Court of Appeals effects a recapture of earnings of the air carrier under closed air mail rates in its domestic division contrary to the construction of the mail rate provisions of the Civil Aeronautics Act laid down by the United States Supreme Court in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601 (1949).

4. Whether the Board, in fixing mail rates for an air carrier may give weight to rate-fixing policies desirable in the public interest for the air transportation industry as a whole and, therefore, for the particular air carrier (for which mail rates are being fixed) as an integral part of such industry.

STATUTES INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,¹ which will be referred to as the Act, are set forth in the Appendix hereto.

STATEMENT

Chicago and Southern Air Lines, Inc. (C&S)² during the period relevant to this case conducted domestic air transport operations over routes extending between Chicago and Detroit, on the one hand, and Houston and New Orleans, on the other, and international air transport operations over routes extending between the two last mentioned cities and Caracas, Venezuela via Havana and Kingston. The certificates of public convenience and necessity for both operations authorize the transportation of mail, persons, and property.

This case concerns the fair and reasonable rates for the transportation of mail in the international division of C&S fixed by the Board on October 18, 1951, for the period January 1, 1948 to December 15, 1950; and involves the question of whether earnings of the carrier experienced in its separate domestic division during that period under final air mail rates fixed by the Board on July 28, 1948, and unchallenged during such period must, as a matter of law, be

¹ Act of June 23, 1938, c. 601, 52 Stat. 977, as amended, 49 U.S.C. 401, et seq.

² Chicago and Southern Air Lines, Inc., has since merged with Delta Air Lines, Inc. (Delta) by statutory corporate merger, Delta being the surviving corporation. Delta was substituted as the intervenor below subsequent to the decision of the Court of Appeals (R. 78).

used to reduce the carrier's mail pay requirements in its international division.

Pursuant to Section 406(b) of the Act, the Board is empowered to "fix different rates for . . . different classes of service". In accordance with its unvarying practice in cases where a single air carrier conducts substantial international operations in addition to domestic operations, the Board classified the international and domestic operations of C&S into two separate rate-making divisions. Some of its related policy reasons as expressed in the opinions of the Board below were: (a) "many considerations which enter into the fixing of an international rate are different from those entering into the establishment of a domestic rate" (R. 20); (b) the desirability of achieving maximum incentive, by replacing a carrier's temporary air mail rates on a "cost-plus" basis with permanent final rates, is such that it is undesirable to delay putting a carrier on final rates for its domestic system pending the completion of a proceeding designed to set final rates for the international system (R. 19, 20); (c) it is desirable "to maintain the comparative status between those domestic operators which have foreign routes as against those which do not have foreign routes", not only in order to encourage incentive by creating "class rates" for groups of domestic carriers within which each carrier must compete in securing revenue and in controlling costs, but also because of the administrative desirability of preserving "a comparative status between carriers" so that the Board can "analyze the operations . . . within a class in the light of the results achieved by others within the same class" which is a rate-making procedure proven "to be the most satisfactory and practicable available to the Board" (R. 54-55); and (d) the fact that "if the domestic air transport system can be

kept financially sound, the public must ultimately benefit" (R. 54).³

Accordingly, the Board in different proceedings, concluded at different times, set final and different mail pay rates for C&S's domestic and international divisions.

The domestic case was completed first. In July of 1948 the Board fixed final "need" mail rates⁴ effective January 1, 1948, for the air carrier operations of C&S over its do-

³ On this important consideration the Board said (R. 54):

"If an offset policy were adopted, the almost invariable result would be that, as in the instant case, the profits from a carrier's domestic operation would be used to sustain any international operations it might have. Recognizing this likelihood, we hesitate to burden the more robust segment of the industry with the obligations of the economically weaker part. For if the domestic air transport system can be kept financially sound, the public must ultimately benefit, putting aside any consideration of the obvious advantage of reduced rates of mail compensation. Thus, we anticipate that if the carriers' earning position continues strong, reductions in the domestic fare level will be possible, thereby giving impetus to the further development of the industry. In addition, with improved earnings, the domestic operators should be able to benefit the public and themselves with more modern aircraft, and with improved methods affording safer and more efficient operations. We cannot escape the thought that if we allow international operations to be carried on the back of domestic operations, we shall be subjecting the latter to an unjustifiable strain."

⁴ The Board fixes two types of rates of compensation for the transportation of mail under Section 406 of the Act (*infra*, Appendix). One is called a "service rate". It is subsidy-free and is fixed in terms of mail actually transported, such as 45 cents per ton-mile for the Group I class of subsidy-free domestic air carriers (American Airlines, Inc., Eastern Air Lines, Inc., Trans-World Airlines, Inc., and United Air Lines, Inc., herein sometimes referred to as "American", "Eastern", "TWA", and "United", respectively) and 53 cents per ton-mile for the Group II class of subsidy-free domestic air carriers (Braniff Airways, Inc., Capital Airlines, Inc., Delta Air Lines, Inc., National Airlines, Inc., Northwest Airlines, Inc., and Western Air Lines, Inc., herein sometimes referred to as "Braniff", "Capital", "Delta", "National", "Northwest", and "Western", respectively). The service rate includes allowances for costs allocable to the mail service and for a rate of return on a portion of investment allocable thereto. C.A.B. Administrative Separation of Subsidy from Total Mail Payments to Domestic Carriers, p. 8 (September, 1951). The other type is the "need rate". In order to meet the "need" standard set forth in Section 406(b), this type of rate includes compensation greater than would be included in a service rate. Customarily a "need rate" is fixed in terms of a formula geared to aircraft miles flown.

mestic air routes. This decision of the Board is reported in *Chicago and Southern Air Lines, Inc., Mail Rates*, 9 C.A.B. 786. In that proceeding the Board estimated the revenues which would be received by C&S from traffic carried (other than mail) in the domestic division and the expenses of conducting its operations therein. The difference between such revenues and expenses is known as "break-even need". After making appropriate allocations of total investment between the domestic and international divisions, it determined the exact amount of investment for rate-making purposes which C&S would require to conduct its domestic operations and upon which a fair rate of return (profit element) was allowed.

The Board then proceeded to establish "need" mail rates for C&S's domestic division which would cover C&S's "break-even need", as determined by the Board in the light of the objectives of the Act, and to allow for a fair return on investment allocated to that division. At 9 C.A.B. 786, 810-811, it stated that it was adopting a sliding-scale formula for the payment of these mail rates related to the percentage of passenger seats occupied to the seats available (load factor), whereby the estimated effective mail rate per revenue plane mile flown would be gradually reduced as the load factor increased.^{4a}

^{4a} Thus the estimated effective mail rate per revenue plane mile flown, at a load factor of 60%, was 26¢. An increase in load factor to 70% or 80% would cause the rate to drop to 17¢ or 8¢ respectively. 9 C.A.B. 786, 811. The Board stated that it was adopting the sliding-scale type formula for "the same reasons that we relied upon in applying the sliding-scale formula" in *Continental A. L., Mail Rates*, 8 C.A.B. 825 (1947). There the Board had pointed out that: "... A sliding-scale rate formula should serve in the instant case to minimize the possibility of frequent rate revisions attributable to uncertainties in predicting Continental's passenger traffic. The public interest will also be served by providing the carrier with an effective incentive for maximum development of its routes consistent with economical and efficient management, since Continental will earn proportionately greater profits with the increasing development of its traffic potential, while at the same time the burden on the Government through need mail payments will be progressively reduced." 8 C.A.B. 825, 840.

From the excerpt from the Board's decision set forth in the footnote below ⁵ one further very important fact may be ascertained. On the basis of the facts then before it, the Board accepted the estimate that C&S would achieve a passenger load factor of 60.09 percent. The Board also estimated that such a load factor would yield a rate of return after taxes of 7.4 percent. But the Board did *not* intend this as a fixed rate of return to be built into C&S's mail rate. As can be readily ascertainable from the table in-

⁵ "... The operating income per revenue plane mile before Federal income taxes, and the rate of return on recognized investment after income taxes at 38 percent, for various load factors indicated, are presented below. .

Revenue passenger load factor	Operating income before income tax, per revenue mile	Percent return on recognized investment after income taxes at 38%
Percent	Cents	Percent
50	—3.85	(1)
55	3.87	3.6
60	7.90	7.3
65	11.03	10.2
70	14.16	13.1

¹ The loss of 3.85 cents per revenue mile is equivalent to a loss of 5.7 percent on recognized investment, without allowance for Federal tax credits.

"From the above tabulation, it appears that C&S under honest, economical, and efficient management may be expected to earn a rate of return, over an annual period, of 7.3 percent, with a 60 percent annual revenue passenger load factor. At the forecast passenger load factor of 60.09 percent, the estimated rate of return after taxes is 7.4 percent. It should be noted that with an average annual passenger load factor of 60 percent, the average base mail rate will amount to 29.8 cents per airplane mile, but the average effective mail rate will amount to approximately 26 cents per revenue plane mile flown.

"An extra cushion against unforeseen developments will be provided to the extent that C&S succeeds in developing additional revenues from express, freight, and incidental sources above the level forecast for the future period. Similarly, any economies which the carrier's management succeeds in accomplishing through effective cost controls or improved operating procedures and techniques, which serve to avert or mitigate anticipated increases in prices and to decrease operating costs below the unit cost of 116.6 cents per revenue plane mile estimated herein, will inure to the carrier in the form of higher earnings." *Chicago and Southern Air Lines, Inc., Mail Rates*, 9 C.A.B. 786, 812 (1948).

cluded in the Board's decision as quoted in footnote 5, the Board anticipated and intended that C&S's rate of return would vary with the load factor it experienced. Furthermore, regardless of the passenger load factor experienced by C&S, the Board anticipated and intended that any "economies" which the Company's management effected would "inure to the carrier in the form of higher earnings", and, accordingly, increase the rate of return. Thus the Board found air mail rates to be fair and reasonable for C&S under which the rates of return on the investment allocated to the domestic division would vary, up or down, depending upon the passenger load factor and/or cost level experienced by C&S. The Postmaster General was a party to the proceeding and did not make any objection to the rates fixed.

Throughout the years 1948, 1949, and 1950 the mail rates established by the Board for C&S's domestic division remained unchallenged by the Postmaster General or by anyone else. As required of all air carriers, C&S filed quarterly reports with the Board which were available to the public and which showed the results of operation under such rates. Pursuant to Section 406(a) of the Act (*infra*, Appendix), the Postmaster General, at any time during this period, could have filed a petition with the Board seeking a revision of the rate and the Board would have been required to hold a hearing and render a decision thereon.

Three years after its final order fixing the rates for C&S's domestic operations and in a proceeding separate from that in which the final rates for domestic operations had been fixed, the Board determined the final "need" mail rates for the air transport operations of C&S in its international division. In its Statement of Tentative Findings and Conclusions issued on May 18, 1951 (R. 6-48) and Order to Show Cause of the same date (R. 49, 50), it proposed to fix a mail rate for C&S's international division retroactively for the period from November 1, 1946 to December 15, 1950, and a different "need" rate prospectively from December

16, 1950. It is that part of the mail rates set in this proceeding for the international division during the retroactive period January 1, 1948 through December 15, 1950, which is now before the Court.

The Postmaster General filed objections to the Board's Tentative Findings and Conclusions issued in the international division rate proceeding. He now claimed that the earnings which C&S had achieved during the period of 1948 through 1950, which reflected revenues from commercial services and compensation pursuant to the final mail rates set in 1948 for its domestic division, included "excess" earnings in the amount of approximately \$654,000; and that this amount was "other revenue" which under Section 406(b) of the Act, must, as a matter of law, be applied in reduction of the amount of the "need" of the air carrier for the same period determined by the Board to be required for C&S's international division in the 1951 proceeding.^{5a} The Postmaster General, overlooking the fact, as noted in the portion of the Board's decision in the domestic rate case quoted in footnote 5 above, that the Board had set variable rates of return on the estimated investment allocated to C&S's domestic division depending upon the passenger load factor and/or cost level experienced by C&S, focused entirely upon the sentence that "at the forecast passenger load factor of 60.09 percent, the estimated rate of return after taxes is 7.4 percent." Claiming that this rate of return had a special legal significance over and above any of the other variable rates of return which the Board anticipated and intended C&S to receive depending upon the passenger load factor and/or cost level it achieved, the Postmaster General asserted that the maximum earnings to which C&S was entitled was this 7.4 percent figure applied to the actual investment allocated to the domestic division during

^{5a} See pp. 4-5 of the Answer of Postmaster General to CAB Order to Show Cause, No. E-5385. By stipulation filed with this Court, citations to the unprinted portions of the record below may be included in the briefs.

the years 1948 through 1950. As noted above, the 7.4 percent return was one of many possible rates of return which the Board anticipated C&S might receive if (a) it achieved the forecasted 60.09 percent passenger load factor, (b) it maintained the exact cost level which the Board estimated it would experience, on the facts then before it, and did not achieve any of the "economies" which the Board specifically stated might be achieved, with a consequent increase in earnings, and (c) it maintained the exact level of investment estimated by the Board, on the facts then before it, which it had allocated to, and allowed for, the domestic division. As a matter of fact, as a result of economies effected and of accounting adjustments (largely in depreciation accounts, R. 65) the reports of C&S to the Board indicated that C&S had averaged a rate of return throughout the years 1948, 1949, and 1950 of 12.51% on its actual investment allocated to the domestic division. It is the volume of earnings reflecting the difference between an application of one of the many rates of return estimated by the Board in the 1948 domestic rate case as achievable by C&S, namely 7.4 percent, to actual investment allocated to the domestic division, and the 12.51% return thereon actually experienced, amounting to approximately \$654,000, which the Postmaster General now claims as "excessive" and must be applied in reduction against the "need" determined by the Board to be required for C&S's international operations in the proceeding now before this Court.

There were three positions taken regarding this issue in the following procedural steps before the Board, and subsequently before the Court of Appeals.

The Postmaster General continued in his assertion that, in determining the "need" of C&S in 1951 in the international division rate case for the period 1948 through 1950, the Board *must*, as a matter of law, look back to the actual experience of C&S during this same period during which it was operating under a final mail rate order established in 1948 for the domestic division, and apply in reduction of

the international "need" what the Postmaster General claimed as "excess" profits on the domestic division as computed above.

C&S asserted that, as a matter of law, the Board could *not* reduce the international "need" determined by the Board in the 1951 proceeding by an amount representing a portion of its earnings on the domestic division, on the grounds that "the C&S domestic rate has been finalized and closed since 1948" and "having remained unchallenged for the entire duration of their existence, the Board is not legally empowered to revise such rates retroactively or to disturb past earnings arising thereunder."⁶ The Board's staff, represented by Bureau Counsel, also questioned the Board's power to make the reduction requested by the Postmaster General (R. 53).

An alternative position, taken by both C&S and Bureau Counsel, was that the Board could refuse to reduce the international "need" by C&S's earnings on its domestic division as a valid exercise of its discretionary authority granted under Section 406(b) of the Act.

The Board in its opinion accompanying its final order affirming the action proposed in its Statement of Tentative Findings and Conclusions, rejected the Postmaster General's contention that, as a matter of law, it *must* make the reduction requested by the Postmaster General. It did not decide the question of whether, as a matter of law, it could *not* make the reduction requested by the Postmaster General, but rather held that it could decline to take such action "if there are sound reasons for not doing so as a matter of economic policy." (R. 53-55)

Following a denial of the Postmaster General's Petition for Reconsideration (R. 62), the Postmaster General filed a Petition for Judicial Review with the court below of the orders of the Board fixing the mail pay of C&S on its in-

⁶ Answer of C&S to Postmaster General's Petition for Reconsideration, p. 2, dated November 26, 1951, filed in the record in this proceeding before the Board.

ternational division (R. 2-6). The court below held, Judge Prettyman dissenting, that \$654,000. derived from the domestic operations constituted "all other revenue of the air carrier" which the Board must, under Section 406(b) of the Act, apply in reduction against the "need" of the carrier's international division as determined by the Board. Judge Prettyman would have affirmed the Board's decision on the ground that when Congress gave the Board power to fix different air mail rates for different classes of service, it meant for the Board to make separate calculations for such different classes and not to take into consideration factors unrelated to the service for which the rate is being fixed. (R. 75-76) But, he stated, that if that position should be in error, the soundness of a complete separation of the foreign from the domestic division persuaded him that the Board could act as it did. (R. 76)

SPECIFICATION OF ERRORS

The Court of Appeals erred:

(1) In holding that the Civil Aeronautics Board, in fixing air mail rates for the international division of C&S as a separate class of service and as a separate rate-making unit from its domestic division, was empowered by Section 406 of the Civil Aeronautics Act to apply any of the carrier's earnings in the domestic division in reduction of the carrier's "need" for mail compensation in its international division;

(2) In holding that as a matter of law the Board is authorized, and required, to effect a recapture of past earnings in the domestic division of C&S, in which mail rates which had long been closed and with respect to which no proceeding was pending, by applying such earnings in reduction of the carrier's "need" for mail compensation in its international division in a subsequent proceeding in which the only issue was the fixing of mail rates for the international division separately classified as such for rate-making purposes;

(3) In holding that the direction of Section 406 of the Act to the effect that the Board, in fixing air mail rates for a particular class of services of an air carrier, shall take into consideration the "need" of the carrier for certain developmental purposes, includes a requirement that the Board go outside such class of service and ascertain whether there are any other revenues of the air carrier arising in some other class of service which could possibly be so applied in reduction of such "need";

(4) In assuming, and in effect holding, that Chicago and Southern had received excess earnings on its domestic services;

(5) In holding, if the Court of Appeals was not in error in its holding specified in (1) above, that Section 406 of the Civil Aeronautics Act does not vest discretion in the Board to determine whether it should apply in reduction against the carrier's "need" for air mail compensation on its international division any portion of other revenues of the carrier derived from its domestic division in which a final and unchallenged mail rate had been fixed;

(6) In holding that the Board's determination was unlawful insofar as it gave effect, for reasons of public interest, to rate-making policies of importance to the air transport industry as a whole in fixing the rates of a single carrier which is an integral part of that industry; and

(7) In setting aside the order of the Board.

SUMMARY OF ARGUMENT

I

The application of the past earnings of the domestic division of C&S, reflecting commercial revenue and compensation under final and unchallenged mail rates, in reduction of the "need" of C&S for mail compensation of its international division is not authorized by Section 406(b) of the Act. While that section, in stating the standard to govern

the Board in fixing mail rates, provides that the Board shall take into consideration, among other factors, the "need of each such air carrier for compensation for the transportation of mail sufficient . . . together with all other revenue of the air carrier" to enable the carrier to meet the statutory objectives, these references to the "need" and revenues of the "air carrier" are qualified by other language in the Section. This other language is an express provision that in fixing mail rates, "the [Board] . . . may fix different rates for . . . different classes of service." This latter authority necessarily embraces, consistently with well-recognized concepts of public utility rate-making, the power of the Board to establish separate territorial units of the carrier for rate-making purposes and to fix rates for a unit smaller than the carrier's whole operation. The meaning of the statutory references to "need" and revenues of the "air carrier" must be construed so as to give effect to the Board's authority to establish separate rate-making units.

The Board's action in 1948 in fixing final mail rates for C&S's domestic division as a separate rate-making unit was a lawful and unchallenged exercise of its powers under Section 406(b); and, therefore, the "need" of C&S which Section 406(b) directs be taken into consideration by the Board in the present international division proceeding must be construed to refer only to the international division of C&S for which rates are now being fixed.

A contrary construction of Section 406(b) would impute to Congress an intention to abandon the established principles of public utility rate-making: (1) that the rate fixing agency has power to fix rates for territorial units less than a utility's entire operations and (2) that final and unchallenged rates cannot be retroactively reviewed or revised. This Court in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U. S. 601 (1949) has expressly held that the Board is not authorized to fix mail rates retroactively to a period in which a final rate previously fixed was in effect and unchallenged.

A construction of the Act which would permit the application of past earnings of the domestic division of C&S, reflecting commercial revenues and compensation under final and unchallenged mail rates, in reduction of its "need" for mail compensation in its international division would be contrary to the basic objectives expressed in the Act in that such construction: (1) would create a cost-plus system of rate-making for those carriers which operate both domestic and international services, (2) would jeopardize the established overall national air policy of the United States with respect to international air transportation by creating economic conditions which might well result in the operation of United States international air routes by a single carrier, a policy heretofore rejected as undesirable to the national interest, (3) would impair the financial stability of air carriers by destroying the finality of earnings realized under final mail rates and (4) would hamper the development of domestic air services by making it impossible for air carriers engaged in both domestic and international services to compete effectively in domestic services with air carriers engaged exclusively in domestic services.

II

If, contrary to Petitioner's contentions as summarized above under I, Section 406(b) is to be construed as requiring the Board to "take into consideration . . . the need . . ." of the carrier as a whole whenever it fixes mail rates, the Board's decision in the case before this Court is a valid exercise of this discretionary authority.

The Board in its decision did not find that the actual earnings of C&S on its domestic services, reflecting commercial revenues and compensation under the final mail rates fixed in 1948, were in excess of fair and reasonable rates for that service or in excess of the carrier's need for that service. In its 1948 decision, the Board had fixed a sliding-scale of mail rates variable according to the actual load factors (ratio of passenger seats occupied to passenger

seats available) which C&S might develop and, as the Board expressly recognized in that decision, the rates of return on investment which C&S might realize under those mail rates could vary from 3.6% at a 55% load factor to 13.1% at a 70% load factor. The Board also pointed out that the benefits of economies and improvements in operations would "inure to the carrier in the form of higher earnings". The reported earnings of C&S during the period in question were 12.5% on its investment allocated to the domestic division. The Board has not determined that any part of this 12.5% return represents legally excess earnings.

In its decision fixing mail rates in the international division now before this Court the Board did not ignore the domestic earnings of C&S. On the contrary, the Board took note of the fact that C&S had earned on its domestic division a return of 12.5% on investment. It then considered in detail the question whether any portion of those earnings should be applied in reduction of the "need" which would otherwise be found to exist in relation to the international services. The Board concluded that considerations of public interest which are set out in detail in the Board's opinions, and which are clearly within the contemplation of the objectives of the Act, required that the mail rates for the international services should be fixed without any reduction in such rates to reflect any part of the domestic earnings. The court below did not find that the considerations of public interest which the Board recites in its decision as controlling its determination of its treatment of the domestic earnings were arbitrary or capricious or outside of the statutory objectives. Clearly therefore, the Board's action is an entirely proper and authorized exercise of the broad discretion granted expressly to the Board by the Act in the fixing of mail rates necessary to meet the statutory objectives.

ARGUMENT

- I. WHEN THE BOARD, UNDER AUTHORITY OF THE ACT, SEPARATELY CLASSIFIED THE DOMESTIC AND INTERNATIONAL OPERATIONS OF C&S AS SEPARATE RATE-MAKING UNITS, IT WAS NO LONGER EMPOWERED BY THE ACT, WHEN FIXING AIR MAIL RATES IN THE INTERNATIONAL DIVISION IN 1951, TO APPLY IN REDUCTION OF THE "NEED" OF C&S FOR THE 1948-1950 PERIOD IN ITS INTERNATIONAL DIVISION ANY PORTION OF THE EARNINGS WHICH WERE REALIZED DURING THE SAME PERIOD IN THE DOMESTIC DIVISION UNDER FINAL AND UNCHALLENGED AIR MAIL RATES FIXED IN 1948 IN A SEPARATE PROCEEDING FOR THE DOMESTIC DIVISION.

Introduction—It has been the consistent practice of the Board in all cases of air carriers engaged both in domestic and in substantial international operations to establish separate rate-making divisions for these two different classes of service. The Board has specific power to do this under the provisions of the first sentence of Section 406(b) which authorizes it to fix "different rates for . . . different classes of service". The Board, having thus established such separate rate-making divisions in such cases has consistently proceeded to fix rates for each division in a separate proceeding. This has had the effect of treating the words "air carrier" in the second sentence of Section 406(b) as if those words meant the division of the air carrier for which rates are being fixed.⁸

The Postmaster General (and the court below) come forward with a position never urged before and claim that

⁸ Section 406(a) of the Act (*infra*, Appendix) empowers and directs the Board to fix and determine, after notice and hearing, fair and reasonable rates of compensation for the transportation of mail by aircraft. The first sentence of Section 406(b) provides that "In fixing and determining fair and reasonable rates of compensation . . . the [Board] . . . may fix different rates for . . . different classes of service . . ." (Emphasis supplied.) The second sentence provides that in determining the rate in each case the Board shall take into consideration, among other factors, the "*need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.*" (Emphasis supplied.)

the words "air carrier" as used in the phrases of the second sentence of Section 406(b), "need of each such air carrier" and "all other revenue of the air carrier", should be construed literally to mean the air carrier as a whole, including all divisions.

Petitioner submits that complete reliance upon the literal import of the words "air carrier" as used in the second sentence of Section 406(b) to establish Congressional intent in regard to the problem at bar, is in error. As this Court has declared, if the literal import of words used in a statute is not consistent with "the policy of legislation as a whole" or will lead to "absurd results", they will be modified.⁹

The controlling guide to Congressional intent under these circumstances are the canons of statutory construction to the effect that a part of the statute must be construed with reference to the leading idea or purpose of the whole act so as to induce an harmonious whole,¹⁰ and that if there is doubt in one section of the act, another may be used to expand or restrict its meaning.¹¹

With this in mind, Petitioner develops the following arguments in the subsections below in support of its Point I as stated above:

First, Petitioner asserts that Congressional intent in granting the Board power "to fix different rates for . . . different classes of service" in the first sentence of Section 406(b) must be considered in determining the content of the words "air carrier" in the second sentence of Section 406(b);

Second, Petitioner asserts that Congressional intent must be much more clearly shown than it is in Section 406(b) before those words can be construed to break with the established principles of rate-making existing at the time the

⁹ *United States v. American Trucking Associations*, 310 U.S. 534, 543 (1940).

¹⁰ *In re Public National Bank of New York*, 278 U.S. 101 (1928); 2 Sutherland, *Statutory Construction* (3rd ed. 1943), p. 336.

¹¹ *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381 (1939).

act was passed, and subsequently thereto, wherein a rate-making body had the power to fix rates on the basis of a territorial unit less than company-wide operations, and that a final and unchallenged mail rate could not be retroactively reviewed or revised. Particular reliance in this connection is placed upon the decision of this Court in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601 (1949) where it was decided that the Board did not have authority to fix a new mail rate for an air carrier, retroactive during a period in which a final rate previously fixed by the Board was in effect and unchallenged because, among other reasons, Congress did not intend to break from established traditions of rate-making;

Third, Petitioner asserts that the intent of the Act, as revealed in its expressly stated purposes and as the Act has been construed by this Court, is in direct contradiction to the construction of Section 406(b) urged by Postmaster General and adopted by the court below; and

Fourth, Petitioner asserts that, contrary to the contention of the Postmaster General that the Board's prior administration of the Act supports his contention, the Board has consistently prescribed that a final and unchallenged mail rate had integrity and could not be retroactively revised without jeopardizing many of the basic purposes of the Act, and that this construction of the Act by the agency entrusted with its administration, is entitled to great weight.

A. If, in fixing the air-mail rates in the international division of C&S, the Board must also determine the "need" of the carrier as a whole, the express authorization to "fix different rates for . . . different classes of service" of an air carrier becomes meaningless, contrary to well recognized principles of statutory construction.

Petitioner submits that the first sentence of Section 406(b) where the Board is given authority to fix different air mail rates for "different classes of service" of an air carrier has an important bearing upon the meaning of the second sentence. It submits that the words "air carrier"

in the second sentence must be construed to mean a division of an air carrier in a situation where the Board has utilized its power under the first sentence and has established a division in which it has set a final rate. This construction will render the statute an harmonious whole.

This point is immediately evident by focusing upon the Congressional directive in the second sentence of Section 406(b) that the Board is to "take into consideration, among other factors", in fixing and determining mail rates the "need" of the air carrier "for compensation for the transportation of mail sufficient," first, "to insure" the performance of the mail service, and second, "together with all other revenue of the air carrier, to enable" it, under "honest, economical, and efficient management, to maintain and continue" the developmental purposes, including national defense purposes, of "air transportation."¹²

If the Postmaster General and the court below are correct, this determination of "need" must be made in every case for the air carrier as a whole.¹³ Under this

¹² In this connection Petitioner submits that the court below misconstrued the second sentence of Section 406(b) when it said (R. 72) that the "duty of the Board in fixing 'fair and reasonable rates of compensation' under Section 406(b)" is "in each case to 'take into consideration, among other factors . . . all other revenue of the air carrier.'" Petitioner submits, however, that the statute *cannot* be so read grammatically. The Board is directed to "take into consideration" the "need" of the carrier with its dual purposes, and not merely "all other revenue" which is a very different legal concept from "need". This misconception of Section 406(b) which automatically suggests "offset" to the mind, coupled with a misunderstanding of the Board's intent in the domestic mail rate case to set a variable rate of return, rather than a specific rate of return from which a "corpus" of "excess" earnings could be automatically determined, may account in a large degree for the error of the court below.

¹³ The determination of "need" is usually a complex process, emerging after exhaustive consideration of what services performed and to be performed should be underwritten as being required by the commerce, national defense, or Postal Service of the United States (see, e.g., R. 24; and *Braniff Airways, Inc., Mail Rates*, 1 C.A.A. 353, 359 (1939)), of which services and equipment are justified under the economical and efficient management standard (see, e.g., *Pioneer Air Lines, Inc., Mail Rate*, C.A.B. Order No. E-7225, March 13, 1953, p. 4), of what costs should be allowed or disallowed, of what investment should be recognized as constituting the rate base, of what profit element should be allowed, and so on.

emise the determination of "need" by the Board in 1948 for C&S's domestic division alone, upon which was based the carrier's domestic mail rates (and which was not objected to by the Postmaster General), was in error because the "need" there determined was not for the carrier as a whole. According to them, whatever was done in the domestic division proceeding in 1948 was of no effect because, the Postmaster General and the court below insist, that when the Board determined "need" for the international division in 1951 for the 1948-1950 period, it was in error in not determining need for the carrier as a whole at that time which, of course, would constitute a re-determination of the "need" for the domestic division since that division is part of the whole.

By such a construction of Section 406(b) the action of the Board in 1948 in setting final mail rates for C&S's domestic division is given no final effect. At most it can be considered as setting temporary rates, subject to subsequent adjustment in a later rate proceeding.

The result of such a construction is to write off the power which Congress granted the Board in the first sentence of Section 406(b) to fix rates (*not* limited to fixing "temporary" rates subject to complete revision at subsequent times) for different classes of service. The position of the Postmaster General, to which the court below raised no objection, that it does not question the Board's authority to fix rates separately for different operating divisions of the air carrier, while, at the same time, insisting that "need" be determined for the carrier as a whole (R. 71) is simply incomprehensible in its inconsistency because the statute cannot be construed in two opposite directions at once.

The provisions in the first and second sentences of Section 406(b) harmonize naturally. As Judge Prettyman in his dissent below indicated, the concept of different rates for different services has a definite bearing upon "take

into consideration" in the following sentence (R. 75-76). He then said,

"... When the Board is fixing a particular rate it should take into consideration factors related to that rate, and none other. Such is plain sense, a sort of rule of relevancy."

This position would cause the words "air carrier" in the second sentence to be construed, as Petitioner submits they must be construed, to mean that when the Board commits itself to fixing rates for a division (i.e., class of service), such words mean that division of the air carrier; and that they mean the international division of C&S under the facts of this case.¹⁴

Such a construction would prevent rendering meaningless the words "classes of service" and would make the entire Section fit together properly.

Before turning to other evidence of Congressional intent supporting this conclusion, a brief answer should be given to the argument that authority to set a final mail rate in one division of an air carrier independent of others impairs the control of the Board over grants of subsidy contrary to the intent of Congress. This argument is without substance.

One of the most comprehensive reporting systems in the field of regulatory agencies has been established for air carriers by the Board.¹⁵ The air carriers file exhaustive reports of their traffic and financial experience at frequent intervals which are open to the public. The Board and its

¹⁴ It might be noted also that the words "air carrier" as used in the second sentence must be construed as having a different meaning than their literal meaning in another connection to which surely there would be no objection. If the Board exercises its power under the first sentence of Section 406(b) to set a rate for a "class of air carriers", then the term "air carrier" as used in the second sentence must be construed as in the plural, "air carriers", in order to make sense of the Section. The construction Petitioner advances in a case where the Board exercises its power to set a rate for a "class of services", reaches a similar result.

¹⁵ Sec. 407, 49 U.S.C. 487; Civil Aeronautics Board, Economic Regulations, Part 241, 14 CFR 770.

staff, and the Postmaster General, are at all times informed by this means as to whether or not it appears that a division should have its "need" redetermined.

Thus the Board can, and frequently does, institute a new rate proceeding under Section 406(a) of the Act on its own initiative to reduce the existing final mail rate. The Postmaster General, too, has the authority to file a petition requesting a reduction in the mail rate and could have taken this action at any time during the 1948 to 1950 period in which the final domestic mail rate of C&S was in effect.¹⁶

B. Well-established principles of rate-making in existence at the time the Act was passed confirm a construction of Section 406(b) of the Act which authorizes the Board to fix air mail rates for a territorial unit less than the carrier's whole operation and which prevents recapturing earnings under a closed rate.

In determining the validity or invalidity of the construction which the Postmaster General and the court below wish to give to Section 406(b) of the Act, which would destroy the finality of the rate established by the Board for C&S's domestic division, attention must be focused upon the established traditions of rate-making existing at the time the Act was passed and the question of whether Con-

¹⁶ Actually, the Board on October 1, 1951, reopened the domestic division rates of C&S (CAB Order No. E-5747) and reduced the domestic rates (See *Chicago and Southern Air Lines, Inc., Domestic Operations, Statement of Tentative Findings and Conclusions*, CAB Order No. E-5869, November 15, 1951; and CAB Order No. E-5956, December 19, 1951, making rates final).

It should also be noted that the power of the Board to protect the public interest against excessive subsidy payments exists under any set of circumstances including those not present in this proceeding. As illustrations, if a carrier is on a final "need" rate in one division involving an element of subsidy, and is on a final "service" rate in another division, and it is felt that the earnings under the service rate are excessive, the Board under the power of Section 406(a) can reclassify both divisions into a company-wide rate, which would have the affect of reducing subsidy through a lower average rate, or the Board could consider benefitting the public by reducing the passenger and property rates on the domestic division which would have the affect of reducing earnings.

gress intended in the Civil Aeronautics Act to make a radical break with such traditions.

In the only other proceeding to come before this Court involving the mail rate provisions of the Civil Aeronautics Act, this Court gave a meaning to statutory language in dispute contrary to its literal import upon the ground, among others, that to construe the language literally would be to ascribe a Congressional intention "to break with these traditions of rate-making."¹⁷

The authorization in the first sentence of Section 406(b) which provides that the Board "may fix different rates for . . . different classes of service" of an air carrier is Congressional reflection of the universally accepted tradition in rate-making, in existence prior to the passage of the Civil Aeronautics Act as well as subsequently thereto, whereby public utility regulatory agencies are vested with the authority to fix rates on a territorial unit embracing less than company-wide operations. Often a rate on less than company-wide unit has been required on the basis of the governing statute,¹⁸ but more frequently the determina-

¹⁷ In *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601 (1949) this Court was called upon to construe the language in Section 406(a) of the Act (*infra*, Appendix) which empowers the Board to fix and determine the fair and reasonable rate of compensation for the transportation of mail by aircraft and "to make such rates effective from such date as it shall determine to be proper . . ." The Court held that a rate could not be made effective prior to the commencement of the rate-making proceeding even though the literal reading of the general phrase "make such rates effective from such date as . . . [the Board] shall determine to be proper" would not appear to so limit the Board. After noting that the "language of Section 406(a) . . . reads like a typical public utility rate-making authority . . .", the Court stated that "the rates of carriers and other utilities fixed by public authorities, while usually prospective, are sometimes made retroactive to the date of the commencement of the rate-making proceeding . . ." but "so far as we are aware, they have never been made retroactive to an earlier date." The Court concluded that "the language of the Act does not suggest that Congress intended to break with these traditions of rate-making." 336 U.S. 601, 604, 605.

¹⁸ *Wabash Valley Electric Co. v. Singleton et al.*, 1 F. Supp. 106 (D.C. S.D. Ind. 1932), *aff'd. sub nom Wabash Valley Electric Co. v. Young*, 287 U.S. 488 (1933).

tion of the proper unit for rate-making has either been specifically committed to administrative discretion by statute,¹⁹ or, in the absence of such express statutory authorization considered a matter for administrative discretion.²⁰ A broad expression of those principles was given by this Court in the *Wabash Case*:²¹

“Normally, the unit for rate making purposes, we may assume, would be the entire interconnected operating property of a utility used and useful for the convenience of the public in the territory served, without regard to particular groups of consumers or local subdivisions. But conditions may be such as to require or permit the fixing of a smaller unit . . .”

Such was the rate-making tradition at the time the Civil Aeronautics Act was adopted which is reflected in the provisions of Section 406(b) of the Act authorizing the Board “to fix different rates for . . . different classes of service . . .”.

¹⁹ In *Re Northwestern Bell Telephone Co.*, 164 Minn. 279, 204 N. W. 873 (1925); Wis. Stat. (1929), Section 196.03 (2) which provides that “For rate-making purposes the Commission may consider two or more municipalities as a regional unit where the same public utility serves said municipalities, if in its opinion the public interest so requires.” See Baird, *Should the Rate Making Unit be Fixed by Statute*, 1 U. Chi. L. Rev. 451 (1934).

²⁰ In *American Toll Bridge Co. v. Railroad Commission of California*, 307 U.S. 486 (1939) the commission refused to include in a proceeding to fix rates for a certain toll bridge an investigation of the tolls of another bridge owned by the same company. The company protested. The Court held at p. 494 that:

“In the first instance, at least, determination of the proper unit for rate making was for the commission. The Antioch bridge is not used or useful to render any service covered by the Carquinez tolls; appellant's duty to operate either bridge is independent of its obligation to operate the other. The record discloses no basis on which it reasonably may be held that by limiting the investigation to the Carquinez tolls the commission abused its discretion, . . .”

Cf. *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159, 211 (1929); *Florida Power & Light Co. v. City of Miami*, 98 F. 2d 180, 184 (C.C.A. 5th 1938); *International Ry. Co. v. Prendergast*, 1 F. Supp. 623, 626 (D.C. W.D. N.Y. 1932).

²¹ *Wabash Valley Electric Co. v. Young*, 287 U.S. 488, 497 (1933).

Contemporaneous with the rate-making tradition just discussed wherein a rate-making body may set a rate based upon a unit less than company-wide operations, is the tradition that a rate looks to the future and, as such, when final and unchallenged, is not subject to revision with respect to completed transactions. This principle is established by numerous decisions of this Court.²²

That this fundamental tenet of public utility rate-making was carried over into the Civil Aeronautics Act has been *specifically* held by this Court in *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601 (1949). There it was decided that the Board did not have authority to fix a new mail rate for an air carrier, retroactive during a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a rate proceeding. At 336 U.S. 601, 607 the Court said:

“ . . . a construction *which would make it possible to revise rates retroactively* to any point of time would

²² *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932); *Georgia Railway and Power Co. v. Railroad Commission*, 262 U.S. 625 (1923); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1926); *United States v. New York Central R. Co.*, 279 U.S. 73 (1929). It might also be noted that at the time the Civil Aeronautics Act was passed Congress had before it, in the “recapture provisions” of the Transportation Act of 1920, 41 Stat. 456, 489-91 (1920) adding Sec. 15A, pars. (5) through (18) to Part I of the Interstate Commerce Act, a specific scheme for recapturing excessive earnings which could have been, but was not, incorporated into the Civil Aeronautics Act. Under the “recapture provisions” of the Transportation Act individual railroads which earned more than a fair return under uniform rates set for all railroads or groups of railroads were to hold any amount in excess of such fair return as trustee for the United States and this sum was distributed one-half to a reserve fund to be maintained by the carrier and one-half to a general railroad revolving fund to be maintained by the Interstate Commerce Commission. These provisions were repealed by the 1933 amendment to Sec. 15a, 48 Stat. 220 (1933), 49 U.S.C.A. Sec. 15a (Supp. 1953), upon the recommendation of the Commission. Among the reasons given by the Commission for repeal of the provisions was the fact that they encouraged “extravagant expenditures by the more prosperous companies when times are good” and that they hung “like a cloud over the credit of many companies when times are bad.” *Fifteen Per Cent Case*, 178 I.C.C. 539, 581 (1931).

be a real innovation which should have a more solid basis than our predelictions. We cannot but feel that if the rate-making power were to be put to such a novel use, the purpose would have been made clear. *It is too unprecedented a departure from the conventions of rate-making to rest on mere inference.*" (Emphasis supplied)

Summarizing, therefore, Petitioner submits the following: (1) The Postmaster General has admitted that the Board has the authority "to fix different rates for . . . different classes of service" (R. 72). This authority is confirmatory of a long recognized principle of rate-making in existence at the time the Act was passed that rate-making bodies may fix rates on a territorial unit less than company-wide operations; (2) this Court has declared, on many occasions, both before and after the passage of the Act, that an unchallenged final rate has integrity and cannot be retroactively revised; and (3) these two firmly established tenets of public utility law were in existence at the time the Act was passed, and Congress was undoubtedly aware of them. Accordingly, in the absence of any specifically expressed intent to chart a new course, entirely contradictory to this tradition, it must be assumed that Congress did *not* intend that the Board would have power to recoup now what the Postmaster General asserts were "excess" earnings under a final and unchallenged mail rate for C&S's domestic division.²³

²³ It cannot be argued that the integrity of a rate is somehow diminished because the unit upon which it is based comprises a territorial unit that is something less than company-wide. Such a rule would render completely meaningless the power to fix rates on the basis of smaller units which has been specifically recognized by this Court as part of the rate-making tradition. (See *Wabash and American Toll Bridge Co.* cases cited in footnotes 18 and 20, above.) Thus, assume that an electric company serves 20 communities and in the course of time final rates are set on a municipal basis for each of these communities. Unless each of these final rates has integrity, it would mean that every time the citizens of one community sought a decrease in their particular rate, or the company sought an increase, revision of each of the other rates could be brought into question. Such action would,

C. A CONSTRUCTION OF SECTION 406(b) OF THE ACT WHICH WOULD REQUIRE THE BOARD, IN FIXING MAIL RATES IN A PROPERLY CLASSIFIED INTERNATIONAL RATES MAKING DIVISION, TO DETERMINE "NEED" FOR THE CARRIER DURING A PAST PERIOD IN ITS DOMESTIC DIVISION (WHERE RATES HAD BEEN FINAL AND UN-CHALLENGED) AND, THEREUPON, TO CONSIDER REDUCING OR INCREASING THE "NEED" OF THE INTERNATIONAL DIVISION FOR THAT PERIOD, IS CONTRARY TO THE INTENT OF THE ACT AS REVEALED IN THE EXPRESSLY STATED PURPOSES OF THE ACT AND AS CONSTRUED BY THIS COURT.

1. The finality of previously established final rates would be destroyed and a cost-plus basis of rate-making would result.

If the system-wide "need" of an air carrier must be determined as a part of the rate-making process each time a rate-making division proceeding is before the Board, it means that where mail rates are being fixed for a period in the past, any other division which was supposedly on a final rate will have to have its "need" redetermined (whether a net profit or a net loss results) and reflected in the system-wide "need" of the carrier. Such supposedly final rate will not in fact have been final. Not until the last division rate of a carrier is closed will any rate in reality be final. This clearly is a cost-plus system of rate-making.²⁴ In the experience of the Board the international

of course, constitute a revision of the entire rate schedule which would make the power to set individual final rates in the first place meaningless. "It is not the law that the commission may not act upon one rate, or the schedule at one exchange, without at the same time acting upon all or any other rates within the state." *Logan City v. Public Utilities Com.*, 77 Utah 442, 449, 296 Pac. 1006, 1009 (1931). See also, *In Re Northwestern Bell Telephone Co.*, 164 Minn. 279, 204 N. W. 873 (1925), where the court held the Commission could change the rate in one municipality, without readjusting all rates of the company within the state.

²⁴ The Board has stated its view of the cost-plus system in *Pennsylvania Central Airlines Corp.*, *Motions*, 8 C.A.B. 685, 697 (1947), *aff'd. sub nom Transcontinental and Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601 (1949), as follows:

"Contrariwise the suggestion of the parties to this case is that we assume the responsibility of making up losses incurred over a period of

division rate cases are more difficult and require much more extended periods of time before decision than in the case of domestic divisions (R. 20). If, therefore, every time an international division rate for a past period is being fixed the system-wide "need" of the carrier for the same period must be determined, the advantage in many cases of final domestic rates at an early date disappears and the whole system goes on a cost-plus basis for that period.²⁵

time during which management either did not believe the rate to be an unreasonable one or, if it held such a position, did not see fit to inform us of that fact. On its face the suggestion asks us substantially to put all so-called efficient managements on a cost-plus basis. This would obviously be a reversal of past policies of rate fixing for it would have a natural corollary—the corollary that was freely admitted in this case—that earnings of air carriers in excess of a fair and reasonable rate would be subject to recapture. Such a policy would tend to sap management of those very incentives that in a private economy are essential if we would strive for efficiency.”

²⁵ The Board has emphasized this cost-plus point again recently in *Delta Air Lines, Inc., Mail Rates, Latin American Operations*, C.A.B. Order No. E-7738, Statement of Provisional Findings and Conclusions, adopted September 21, 1953, at p. 14, as follows:

“... Mail rate proceedings are lengthy and complex. Fixing rates in separate proceedings for the two divisions as separate units gives the carrier the incentive to maximum efficiency in at least one division until the rate for the other division is reached and closed. And, since the Board may at any time reopen the rate for either division, there is little danger of excess subsidy mail pay. On the contrary, to adopt a policy which would, in effect, preclude a final rate status for separate divisions of carriers such as Delta, would, by remitting the carrier to a cost-plus basis until all divisions were closed, inevitably result in fixing cost-plus rates for substantial periods of time. This would be unsound as a matter of policy since subsidy support would be likely to increase due to the lack of a full incentive.²⁶

“²⁶ See also *Transcontinental and Western Air, Inc. v. C.A.B.*, 336 U.S. 601 (1949)”.

Even though rates are being determined for a rate-making division primarily for the future, there is always a substantial period of time between the originating date of the proceeding and the final rate-fixing order. If the system-wide determination of “need” were required, cost-plus methods of rate fixing would have to be adopted to some appreciable extent and the incentive to do well on closed rates would be impaired.

Furthermore, if, as a matter of law, the application of all domestic earnings over some minimum rate of return is (as the court below held) required in reduction of the "need" of the international division, it would be a breach of the Board's duty to fail to reopen any final international division rate as frequently and as often as it appeared that such domestic earnings might become available. In other words, the rewards for financial progress domestically would have to be snatched away so promptly to further finance the international division as to make the effort to improve in the domestic division of questionable value. In addition, almost perpetual rate-making periods could well result.

All approaches under the decision of the majority below lead in the direction of the cost-plus system. The incentive to do well on final rates, a condition which is in the public interest (R. 21), particularly in the domestic division, would be impaired if not destroyed. This Court has stated that the cost-plus system of regulation "would not harmonize with the apparent design of the Act." (*Transcontinental and Western Air, Inc., v. Civil Aeronautics Board*, 336 U.S. 601, 606 (1949)). This is a compelling reason to construe Section 406(b) so as to give a rate-making division of a carrier the integrity and independence which will permit rate-making with finality therein at the earliest possible time.

2. The profits of the stronger domestic services of carriers operating both domestic and international services would be applied to financing the international air services and this would jeopardize the national air policy of the United States and defeat a basic intent of Congress.

a. THE HISTORY OF THE DEVELOPMENT OF OUR NATIONAL AIR POLICY, AND THE REJECTION OF THE "CHOSEN INSTRUMENT" AS RELATED TO THE OBJECTIVES OF THE ACT.

As shown by the Declaration of Policy in Section 2 of the Act,²⁶ among the chief aims of the Congress was the

²⁶ *Infra*, Appendix.

development of an air transportation system "properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense"; the regulation of air transportation in such manner as to foster sound economic conditions therein; and the use of competition to the extent necessary to assure the sound development of such a system.

Domestically, full control over the expansion and development of the air transportation system was given to the Board.²⁷ But internationally there was a different distribution of power. The President was given control of the route structure;²⁸ but the function of supplying financial support when and as necessary was vested in both fields with the Board in Section 406 of the Act.

With respect to one paramount issue the President had the unanimous recommendation of all agencies directly interested in our air transportation system. That related to the question of whether the United States should adopt the so-called "chosen instrument" policy of having only one United States air carrier operating in the field of international operations. Prior to World War II a single United States air carrier system, Pan American World Airways (Pan American)²⁹ operated this country's entire system of international air services (other than trans-

²⁷ Control over routes comes from Section 401 of the Act, 52 Stat. 987, 49 U.S.C. 481; and control over financial support comes from Section 406 of the Act, *infra*, Appendix.

²⁸ Sections 401 of the Act, 52 Stat. 987, 49 U.S.C. 481 and Section 801 of the Act, 52 Stat. 1014, 49 U.S.C. 601, as construed by this Court in *Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948). The Board carries out the President's decision by issuing the appropriate order carrying that decision into effect. In the exercise of the international route expansion and development function the President has, with the advice of the Board and broadly speaking, in accordance therewith, built for the nation a large and expanding route system of international operations. (See *infra*, n. 32).

²⁹ This system is regarded as including Pan American-Grace Airways, Inc., (Panagra), 50% of the stock of which is owned by Pan American.

border operations into Canada). During that War, contracts made by the military establishment with United States air carriers resulted in extensive world-wide operations by some who had theretofore operated exclusively in domestic service. As the War closed, questions of national air policy stood for attention and resolution. Should the "chosen instrument" policy be adopted? If not, what other operators should be placed in the field? Considerations of national defense, foreign relations, foreign and domestic commerce, the Postal Service, and of other matters were involved.

As a result of exhaustive high level consideration given to the matter, the "chosen instrument" policy was rejected. The Board recently summarized the situation with respect to our national air policy and the resulting participation by domestic carriers in the international field, as follows:³⁰

"This policy reflects economic realities if the various carriers operating both domestic and international services are to be expected to continue to operate their international services. It may be noted here that it is not through happenstance that, with the exception of Pan American and Panagra, all United States international air transportation service is rendered by carriers which also operate domestic divisions. Rather, this is the result of a long and arduous policy development participated in by all branches of the Government. Having adopted the policy that the objectives of the Act, the national interest, and the public convenience and necessity would best be served by a system of regulated competition in international air transportation²² in contrast to the so-called 'chosen instrument', similar considerations have moved the Government to adopt the policy of certificating domestic carriers to perform international services. Thus, in the *North Atlantic Route* case²³ the Board emphasized the experience of the domestic operators, their existing organizations

³⁰ Delta Air Lines, Inc., *Mail Rates, Latin American Operations*, CAB Order No. E-7738, Statement of Provisional Findings and Conclusions, September 21, 1953, at pp. 10-11.

of trained personnel, and their ability to promote and develop the international service through their domestic systems, in deciding that the public convenience and necessity would best be served by certificating domestic carriers to operate transatlantic routes. This policy was approved by the President and was implemented in later route cases in which Braniff and C&S were certificated to Latin America, and Northwest across the Pacific. And, as indicated above, the international services of these carriers have been regarded as separate rate-making units for which separate final mail rates have been established."

"22 American Export Airlines, Transatlantic Service, 2 C.A.B. 16 (1940)."

"23 Northeast Airlines, *et al.*, *North Atlantic Route Case*, 6 C.A.B. 319 (1945)."

Substantial international air services have been assigned to these air carriers who are also engaged in domestic air transportation.³¹ The "chosen instrument" policy, though thus rejected, survived as an issue and has received extensive consideration, but without success in the Congress. No bill to establish the "chosen instrument", of which there were several which were pressed vigorously, has ever passed the Congress; and thus, though repeatedly offered the opportunity, Congress has not changed the carefully developed national air policy referred to above under which our post-war international air transportation system has been developed.³²

³¹ TWA has 30,119 international route miles authorized, Braniff has 7,870 such miles, Northwest has 14,984, and Delta has 3,270. Pan American's total authorized mileage is 155,858 (Civil Aeronautics Board, Official Airline Route and Mileage Manual, Part II-International and Overseas Section).

³² See, e.g., Hearings Before the Subcommittee on Aviation of the Committee on Commerce, United States Senate, 79th Congress, 1st Session, on S. 326; Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, 80th Congress, 1st Session, on Bills Relative to Overseas Air Transportation; Hearings Before a Subcommittee of the Com-

The national air policy, loaded with considerations of national interest affecting our world-wide relationships, has thus been implemented. The achievement of one of the principal objectives of the Act—i.e., to develop an air transportation system adequate to meet the national needs—has been accomplished in the foreign field by the President (with the advice of the Board and, on the “chosen instrument” issue, with the advice of all departments and agencies interested in the national air transportation system). The decision of the majority of the court below jeopardizes that achievement; and if permitted to stand, threatens to reverse the unanimous decision on the “chosen instrument” issue.

b. THE DECISION OF THE COURT WILL JEOPARDIZE
THE NATIONAL AIR POLICY.

As the Board has put it, in speaking of carriers engaged in both domestic and international operations, (1) the domestic segment is the more “robust”, and the international segment is the “economically weaker”, part of the air transport industry (R. 54); and (2) “. . . the percentage of subsidy to total mail payments is substantially greater for the international air carriers as a group than for the domestic air carriers.”³³ The Board has commented re-

mittee on Interstate and Foreign Commerce, United States Senate, 80th Congress, 1st Session, on S. 987.

The volume of services has grown. In the fiscal year ending June 30, 1940, a pre-War year, Pan American, then alone in this new international field carried 175,000 persons, 98,300,000 passenger miles (CAB Annual Report, 1940, p. 43). In the 12 months ending December 31, 1952, United States air carriers in their international and overseas services carried 2,877,000 passengers, 2,087,000,000 passenger miles. Of this amount, Pan American alone carried 1,412,000 persons, 1,779,000,000 passenger miles (C.A.B. Recurrent Report of Mileage and Traffic Data).

³³ Civil Aeronautics Board, Administrative Separation of Subsidy from Total Mail Payments to United States International, Overseas, and Territorial Air Carriers, June 1952, p. 3. Thus for the current fiscal year ending June 30, 1954, the Board estimates that TWA, Braniff, Northwest, and Delta, will receive in their domestic operations \$9,974,000. of service mail pay and \$500,000. of subsidy (constituting 4.7% of the total), whereas with respect

cently concerning the effect of offsetting domestic earnings against international "need" as follows:

"It is against the background of this carefully and deliberately developed policy of long standing that the impact of the offset proposal must be weighed. So viewed, we believe that to follow a policy of offset can only invite serious consequences far outweighing any short term advantages the proposal may appear to have. Indeed, while it may be true that application of the offset proposal in this proceeding may reduce the immediate subsidy bill to the Government, in the long run increased subsidies are likely to result rather than savings. In the first place, Delta, as well as the other carriers similarly situated, may well be induced to withdraw from international operations. At present, no U. S. international carrier is able to operate without subsidy²⁴ and this condition may prevail during the foreseeable future. In contrast, the domestic services of many of the carriers operating internationally have reached the point where they require no subsidy. Included in this category is Delta, here involved, which is in a position to produce adequate earnings on its domestic division, without Government subsidy. Faced with a policy which would drain such earnings from its domestic division, which it has developed to a stage of self-sufficiency, it is not unlikely that Delta as well as other carriers would be reluctant to continue international service.

"Delta's domestic competitors who do not operate international services are in a position to utilize domestic earnings to improve their service, add new equipment, and engage in promotional activities, while with an offset policy Delta's earnings would be utilized to support its international service. Its domestic competitive position, under such circumstances would cer-

to the international operations of these air carriers they will receive \$5,629,000. of service mail pay and \$12,727,000. of subsidy (constituting 69% of the total) Civil Aeronautics Board, Administrative Separation of Subsidy from Total Mail Payments to United States Air Carriers, September, 1953 Revision, Appendix 4 and 9. For Pan American's international operations the estimate for the same year is \$10,995,000. of service mail pay and \$28,667,000. of subsidy (constituting 72% of the total) (Ibid, Appendix 9).

tainly deteriorate with the result that the carrier would either seek to withdraw from international operations or would reach a state where its domestic service would again require subsidy.

"Nor would carriers be in a position to effect mergers which would otherwise decrease the subsidy bill²⁵ be expected to press for such consolidations. A graphic example is Western Airlines, a domestic carrier operating under a subsidy free mail rate, which has indicated that it is no longer interested in a possible merger with Pacific Northern Airlines, a Territorial carrier having an estimated annual subsidy need for its States Alaska service of \$777,000, if an offset principle is to be applied.

"Assuming that Delta should follow the course we have indicated following adoption of an offset principle, and be permitted to abandon its international service, a replacement would have to be found either in the form of a new carrier or an existing carrier operating in the same area. The first alternative would tend to increase the subsidy bill since the savings inherent in a single established organization operating two divisions would not be present. Parenthetically, it may be pointed out that no question of offsetting domestic earnings could arise in these circumstances. Likewise, the experience and know-how of an established carrier would be lacking. On the other hand, to replace the service with an existing carrier would inevitably tend to limit all American flag service to one carrier in conflict with the policy of competition which has been so laboriously evolved. Clearly the reversal of so well-established a policy should not be done indirectly through a mail rate proceeding not subject to Presidential review and approval."³⁴

"²⁴ Except "stub-end" services such as those operated by American and National which are not truly international services as we are discussing them here.

"²⁵ The subsidy bill to the Government for the domestic services of C&S is estimated to have been reduced by \$539,000 annually as a result of the Delta/C&S merger."

³⁴ *Delta Air Lines, Inc., Mail Rates, Latin American Operations, Statement of Tentative Findings and Conclusions*, C.A.B. Order No. E-7738, September 21, 1953 at pp. 11-13.

Thus, Petitioner submits that the Act should be construed by this Court so that where the Board has established the domestic and international operations as separate rate-making divisions, domestic earnings will not be siphoned into the international division, and thereby avoid jeopardizing the continued operation of our national air policy which has been established and implemented with Presidential approval in order to achieve one of the major objectives of the Act.^{34a}

3. The financial stability of air carriers, one of the principal objectives of the Act, would be impaired by unduly delaying the finality of earnings.

The Declaration of Policy of the Act³⁵ states that the Board should regulate in such manner as to "foster sound economic conditions" in air transportation; and that competition is to be invoked to the extent necessary to assure the sound development of the air transportation system. Section 406 of the Act should be construed to speed, not retard, the realization and continued maintenance of this objective. The legislative history of the Act makes it clear

^{34a} International air services must be performed willingly and aggressively if the objectives of the Act are to be realized. One of the standards which the Board must find that the applicant for a route meets is that it should be "willing". Section 401(d) of the Act, 52 Stat. 987, 49 U.S.C. 481(d)(1). If, as the Board points out in the statement of its views quoted immediately above, a carrier engaged in both domestic and substantial international operations is handicapped in its efforts to compete domestically with carriers engaged exclusively in domestic service by a principle requiring the domestic to support the more costly international service, it certainly will cease to be "willing" in the aggressive development and expansion of the volume of its international operations. The action of the President in deciding that the carrier should perform a service for the nation in international service will be undermined. In this connection, it should be noted that the Act, in recognition of the special circumstances under which foreign air transportation is conducted, omitted that class of service in providing that "It shall be the duty of each air carrier to provide . . . adequate service . . ." Section 404(a) of the Act, 52 Stat. 993, 49 U.S.C. 484(a).

³⁵ *Infra*, Appendix.

that one of the chief aims in its enactment was to provide financial stability in the air transportation industry.^{35a}

One phase of this prime objective of the Act is the development of the air transport industry to a point where it will be financially self-sufficient, i.e., free from dependence upon subsidy (R. 19). It seems apparent without argument that becoming free from dependence upon subsidy is one of the greatest of all forward steps toward "sound economic conditions". For the fiscal years ending June 30, 1954, and June 30, 1955, the Board estimates that all of the ten major trunk air carriers (with one exception to a comparatively minor extent) will be conducting domestic operations on a basis entirely free from subsidy.³⁶ These carriers are American, Eastern, TWA, and United, constituting Group I on a 45 cents per ton mile service mail rate, (this being a common rate for this class of carriers) and Braniff, Capital, Delta, National, Northwest, and Western, constituting Group II on a 53 cents per ton mile serv-

^{35a} "The result of this chaotic situation of the air carriers has been to shake the faith of the investing public in their financial stability and to prevent the flow of funds into the industry. Col. Edgar S. Gorrell, president of the Air Transport Association, representing substantially all of the scheduled American-flag air lines, testified before your committee during the public hearing on H.R. 9738 that \$126,000,000 of private capital has been invested in the present air-transport system and that 50 percent of this investment has been lost . . ." H.R. Rep. No. 2254, p. 2, 75th Cong. 3d Sess. (1930) on H.R. 9738 which was substantially similar to S. 3845 which became the Civil Aeronautics Act of 1938. Congressman Lea, who managed the Civil Aeronautics Act on the floor of the House also stated: "We want to give financial stability to these companies so they can finance their operations and finance them to advantage." 83 Cong. Rec. 8500, 75th Cong., 3rd Sess., May 7, 1938.

³⁶ Civil Aeronautics Board, Administrative Separation of Subsidy from Total Mail Payments to United States Air Carriers, September, 1953 Revision, Appendix 4 and Appendix 5. The one exception is Braniff, which has certain less remunerative local service operations included; but action has now been proposed by the Board which would eliminate all subsidy domestically from the mail rate to be fixed for Braniff's domestic operations for the current period. *Braniff Final Mail Rate Case*, C.A.B. Order No. E-7815, Tentative Decision, October 13, 1953. The Postmaster General has filed Exceptions and a Brief in support thereof.

ice mail rate (this being a common rate for this class).³⁷ Thus TWA, Braniff, Northwest, and Delta, the four domestic air carriers who are engaged in substantial international services, have domestically (in which they perform the much larger portion of their business) achieved this enviable goal of self-sufficiency.³⁸

The construction of the statute contended for by the Postmaster General would, as shown in earlier portions of this brief, make any domestic division rates of Braniff, Delta, Northwest, and TWA, essentially and substantively temporary in nature until the final rates are fixed in the international division, in some cases years later;³⁹ for if system-wide "need" must be determined whenever final rates are fixed, as the court below held, then the results of operating under a domestic division rate are tentative until the loss suffered or the profit realized therein is reflected in the subsidy granted or withheld in the final international division rate. Thus, the stability implied from the Board's above-mentioned subsidy free classification of these four carriers, 83% of whose business is domestic, loses much, if not all, of its meaning; the stability dependent upon the apparent self-sufficient status of domestic operations achieved by Braniff, Delta, Northwest and TWA becomes illusory; and no confidence could be placed thereon. Great confusion as to where the carrier stands financially would result. It will not be fostering "sound economic conditions" if the Board is forced to follow this course.^{39a}

³⁷ Ibid. As to Braniff, note the exception mentioned in the next preceding footnote.

³⁸ In 1952, 83% of the volume of the principal air service performed by these four Companies occurred in their domestic divisions. C.A.B. Recurrent Report of Mileage and Traffic Data.

³⁹ Thus, e.g., TWA commenced international operations on February 5, 1946. Final mail rates in its international division for the intervening period have not yet been fixed.

^{39a} "... If the Board could redetermine rates for a past period when the carrier has made less than an adequate profit, or no profit at all, it could do so when the carrier has made more than an adequate profit. The statute makes no differentiation. The financial confusion which would follow from the lat-

The importance which the Board has attributed to sound economic conditions has been so great as to have caused it to refrain from the recapture of earnings realized during the pendency of a mail rate proceeding, even though admittedly excessive earnings were realized during the period;⁴⁰ and in this connection the Board has stressed the adverse effects of such a policy of recapture on managerial incentive to accomplish increased economies in operation, the question mark which it would write upon all of the air carrier's financial statements, and the consequent impairment of its ability to raise capital.⁴¹

ter conclusion seems obvious. No rate order would be final. No dividend declaration would be secure. No large commitment would be conclusively feasible. No offering of securities would have a firm foundation. We find no indication that Congress meant to create so great uncertainty." *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 169 F. 2d 893, 896 (D. C. Cir. 1948) *aff'd*, 336 U. S. 601 (1949).

⁴⁰ The Board has held that it has the power to reduce mail rates back to the date of the institution of the rate proceeding. *American Airlines, Inc.—Mail Rate Proceeding*, 3 C.A.B. 323, 325-333 (1942). However, the Board has repeatedly refused to recapture earnings realized between the time of the institution of the rate proceeding and the date of decision. *Pan American-Grace Airways, Inc.—Mail Rates* 3 C.A.B. 550, 565 (1942); *Eastern Air Lines, Inc., Mail Rate Proceeding*, 3 C.A.B. 733, 742-743 (1942); *American Airlines Inc., Mail Rate Proceeding*, 3 C.A.B. 770, 776 (1942).

⁴¹ In the *Pan American-Grace Airways, Inc., Mail Rate Case*, cited in the footnote above, after discussing various considerations adverse to recapture (including some growing out of World War II), the Board stated, at p. 565, with respect to the possible recapture of past earnings, though within the rate proceeding period:

"... It would in all likelihood reduce managerial incentive to accomplish increased economies in operation. Management could hardly be expected to exert itself energetically to such purpose with the ever-present fear, however unfounded it might be, that money saved through increased economies would be taken away. It must be granted, too, that such a policy writes a question mark across the carrier's financial statements which purport to reflect its true financial condition; for such statements, upon which investors may have relied, may subsequently be rendered misleading by a retroactive order of the Board. To the extent that such incidents create uncertainty as to the carrier's financial position they tend to impair its ability to attract capital, and a program of debt financing on terms unfavorable to the carrier would inevitably result."

In the case of C&S the disturbing effect to economic conditions would be particularly acute by the substantive recapture which the decision below requires. The entire air transport industry, the financial world, and all concerned relied upon the Board's announced policies favoring final mail rates and fostering of sound economic conditions. Not until 1951 was it ever conceived by anyone that C&S's 1948 domestic rates were other than final, as would be the case if the Postmaster General's success in the court below is permitted to stand. No financial stability, no accurate credit rating, no stable balance sheet position, no dividend policy, and no ability to raise private capital can struggle through such uncertainties as are piled up by the decision of the court below.

4. **It would be impossible for air carriers engaged in both domestic and international air services to compete effectively with air carriers engaged exclusively in domestic services with the result that the domestic public interest would suffer and one of the principal objectives of the Act would be defeated.**

Domestic air carriers operating international routes compete in their domestic services with air carriers engaged exclusively in domestic services.

As has been pointed out above, international air services are economically weaker than domestic air services.

As a result, the air carriers engaged in both types of services would be subjected, under the decision of the court below, to a constant draining off of their domestic earnings for the financial support of their international services. On the other hand, the domestic earnings of carriers engaged exclusively in domestic air services are not subject to that diversion.

Under such circumstances the air carriers operating both types of service could not maintain the same level of domestic earnings as their domestic competitors, and, therefore,

necessarily would compete at a great disadvantage. This condition would jeopardize important public interest objectives with respect to domestic air service which are within the purposes of the Act.

This point can be made clear by a simple example. Petitioner today competes extensively with Eastern Airlines. If Petitioner's profits on the more lucrative domestic routes (upon which it now has a service mail rate) are to be drained off to support the less profitable international routes, then Petitioner is at a severe competitive disadvantage. Eastern, without such a drain on its profits, will have a large body of earnings which it can direct towards securing public support on the routes over which it is competitive with Petitioner by securing larger, faster, and more attractive equipment, by more extensive advertising, by more frequent schedules, and, indeed, possibly by lower passenger and cargo rates.

The increasing public acceptance of air transport in recent years has made it possible for the Board to place a substantial number of domestic air carriers on uniform service mail rates for domestic services without including any element of the subsidy payments. As indicated above, ten of the thirteen domestic trunk-line air carriers, including Petitioner, are now receiving only service mail payments. With this elimination of subsidy, flowing from adequate domestic commercial earnings, further improvements in the amount and stability of domestic earnings can open the way for reductions in domestic passenger and cargo rates, increases in the volume of air-coach services, and other benefits to the public.

But it is axiomatic that domestic passenger and cargo rates must, for competitive reasons, be substantially the same as between carriers. Consequently, the level of domestic earnings of those carriers operating both domestic and international services, depleted by the offset required by the decision of the court below, would provide a higher floor to domestic passenger and cargo rates than would

otherwise be the case—unless the Board should abandon its policy of uniform service mail rates for such carriers. Either of these alternatives would be contrary to the general public interest objectives of the Act.

D. CONTRARY TO THE POSTMASTER GENERAL'S ASSERTIONS, ADOPTED BY THE COURT BELOW, THE BOARD'S PRIOR ADMINISTRATION OF THE ACT DOES NOT SUPPORT THE CONTENTION THAT IT MUST, AS A MATTER OF LAW, APPLY EARNINGS REALIZED UNDER A FINAL AND UNCHALLENGED MAIL RATE IN ONE DIVISION IN REDUCTION OF NEED DETERMINED FOR ANOTHER DIVISION IN A SUBSEQUENT PROCEEDING.

The court below in seeking the proper construction of Section 406(b) of the Act as applied to this case relied upon what it considered to be the "established construction of the Act by the Board which should be given weight." (R. 72) In support of this conclusion it noted that the Board in the past has stated that the "need" referred to in Section 406(b) of the Act is that "of the air carrier as a whole" and that the air carrier is the "primary unit around which the national air transportation system was to be developed through the instrumentality of air mail compensation." *Chicago & Southern Air Lines, Inc.—Mail Rates for Route Nos. 8 and 53*, 3 C.A.B. 161, 190 (1941). (R. 72) It further noted that this principle was reaffirmed in *Pan American Airways, Inc., Alaska Mail Rates*, 6 C.A.B. 61, 67 (1944). (R. 72).

The court below was in error in relying upon these cases as an established construction of Section 406(b) insofar as they might furnish any precedent for this proceeding. On the contrary, the Board's decision in this case that it was not required, as a matter of law, to make the offset requested by the Postmaster General, is in complete accord with its prior administrative practice.

A reading of the 1941 *C&S Case* makes it clear that the Board was there undertaking to establish the entire system of the carrier as the base upon which to determine mail

payments. Within this framework the legal question was posed of "whether the Board may make allowance for the conduct of a passenger and property operation on which no mail is carried in fixing the rates for the transportation of mail over the carrier's system." 3 C.A.B. 161, 187. The Board concluded that it was precluded "from confining its consideration of the carrier's need to that manifested on a segment of its system upon which mail is carried to the exclusion of its need on particular certificated segments of its system serving commerce and the national defense alone." 3 C.A.B. 161, 190. The language which it used, quoted by the court below, was intended to support the conclusion that, within the framework of a system-wide rate-making unit, all operations of a carrier, including its non-mail operations found required by one or more purposes of the Act, should be taken into consideration because such non-mail operations formed part of the system.

Obviously, therefore, there was no question in the 1941 *C&S Case* involving an effort to establish a division. The case is not in point.⁴³

The court below also relied upon *Pan American Airways, Inc., Alaska Mail Rates*, 6 C.A.B. 61 (1944), wherein the Board denied subsidy mail pay on Pan American's Alaska division because of excess earnings from its Latin American division. But the language of the Board in that case must be read in the light of the *sui generis* problem before the Board and its findings in the earlier first opinion in the *Pan American Airways, Inc., Latin American Mail Rates Case*, 3 C.A.B. 657 (1942). In the latter case the Board had instituted a proceeding in 1939 looking to the establishment of mail rates for Pan American, thereby creating an "open" mail rate period. The *Latin American Mail Rates Case* was, after being reopened, ultimately decided simultaneously with the *Alaska Mail Rates Case* in

⁴³ The other cases relied upon in the Postmaster General's brief to the court below, p. 11, except for the Pan American division cases, discussed below, are distinguishable from the instant proceeding upon the same grounds.

1944.⁴⁴ Thus, until 1944 both the Latin American and the Alaskan mail rates were "open" so that instead of recapturing, as it could have, in the *Latin American Mail Rates Case* the "excessive" earnings realized by Pan American during the pendency of that proceeding and then awarding "need" mail compensation for the Alaska division in the *Alaska Mail Rates Case* the Board did the much simpler act of equalizing the situation by leaving both divisions where they were. This is an entirely different situation from Petitioner's case where the Postmaster General wants the Board to "offset" earnings realized in one of C&S's divisions during a *closed* period in which the rate was final and unchallenged against mail pay requirements determined for another division in a subsequent proceeding some three years later! Furthermore, there is another significant distinction. In the *Latin American Mail Rates Case* the Board, after finding and declaring the amount of the "excess" earned during the pendency of that proceeding stated that while it would not recapture the same by retroactively lowering the rate during the pendency of the proceeding, such "excess" earnings should be placed in a special reserve account; and the Board stated that it intended to take such "excess" earnings into account in determining "need" thereafter for other divisions of the carrier. Thus, in lieu of recapture, something analogous to a trust fund was created and notice was given to the carrier that the fund would be applied as indicated. This certainly distinguishes the case from Petitioner's case. If the *Latin American Mail Rates Case* had been closed, as was Petitioner's 1948 domestic rate case, during the period in which the earnings in question had been accumulated, the Board would have had no power to recapture through the device of a "trust fund" for later application elsewhere.

Petitioner therefore submits that the court below was in error in relying upon the 1941 *C&S Case* and the 1944

⁴⁴ The *Latin American Rate Case* was subsequently reopened to revise the amount of "excess" earnings because certain amounts had been erroneously omitted in determining the investment upon which a rate of return was allowed in the original opinion.

Pan American Alaska Mail Rates Case as an "established construction of the Act by the Board" governing this proceeding, as has been developed above. Petitioner furthermore submits that for the Board to have ruled under the facts of this case, as the Postmaster General urged, that the "need" referred to in Section 406(b) is the need of the carrier as a whole, and, therefore, the Board *must* offset a portion of the earnings realized under the final and unchallenged domestic mail rate against the "need" determined for the international division, would have been contrary to its prior administrative practice.

First, it would have been contrary to its holding in *Pan American-Grace Airways, Mail Rates*, 3 C.A.B. 550, 561 (1942) that it could, in the exercise of its discretion, refuse to recapture excess earnings *even* though they were realized during an "open" period.

Second, it would have been contrary to its unvarying policy to classify international and domestic operations into two separate rate-making divisions where the international air transportation operations are of substantial proportion.⁴⁵ In doing so the Board has stated that "we believe the foreign and overseas operation should stand on its own feet for mail-pay purposes".⁴⁶ Such a statement

⁴⁵ e.g. *Transcontinental & Western Air, Inc., Mail Rates*, 6 C.A.B. 595 (1945); *Transcontinental & Western Air, Inc., Transatlantic Mail Rate*, 7 C.A.B. 421 (1946); *Braniff Airways, Inc., Mail Rates*, 8 C.A.B. 971 (1947); *Colonial Airlines, Inc., Bermuda Rates*, 9 C.A.B. 20 (1948); *Braniff Airways, Inc., Mail Rates*, 9 C.A.B. 607 (1948); *Chicago & Southern Airlines, Inc., Mail Rates*, 9 C.A.B. 786 (1948); *Northwest Airlines, Inc., Mail Rates*, 10 C.A.B. 1 (1949); *Transcontinental & Western Air, Inc., Mail Rates*, 10 C.A.B. 803 (1949); *Braniff Airways, Inc., Mail Rates*, 11 C.A.B. 431 (1950); *Northwest Airlines, Inc., Trans-Pacific Mail Rates*, 12 C.A.B. 256 (1950); *Colonial Airlines, Inc., Bermuda Mail Rates*, 12 C.A.B. 737 (1951).

⁴⁶ *Northwest Airlines, Inc., Trans-Pacific Mail Rates*, 12 C.A.B. 256, 257 (1950). See, also, *Pennsylvania Central Airline Corporation, et al., Motions*, 8 C.A.B. 685, 703 (1947), where the Board noted that in the order fixing TWA's domestic rate it had "specifically provided that the rate was not to apply to the international operation, for which we subsequently, in a separate proceeding, fixed a temporary rate. This has the effect of a determination that TWA's domestic and international operations are *separate units for rate-making purposes . . .*" (Emphasis supplied)

of policy, made prior to the decision in this case, is obviously contradictory to any alleged administrative practice which would mean that the Board *must* consider the "need" of international and domestic operations as a whole in such a manner as to require an "offset" of earnings under the domestic division against the "need" of the international division. In this proceeding,⁴⁷ and in subsequent proceedings,⁴⁸ the Board has spelled out even more carefully its view that the accomplishment of the objectives of the Act, can, in a case where domestic carriers have substantial international operations, only be achieved by separate mail rate divisions where each will "stand on its own feet."

Finally, it is obvious that there was direct precedent in the Board's administrative practice, upheld by this Court,⁴⁹ which would have contradicted any holding that the Board was *required* to apply any portion of earnings realized under a *final* and *unchallenged* mail rate against "need" determined in a subsequent proceeding. The Board has already expressed opposition to any construction of the Act which would further the incentive-destroying cost-plus system of rate-making,⁵⁰ and repeated this observation as grounds for its decision in this case. (R. 19-20)

⁴⁷ See Statement, pp. 4-5, *supra*.

⁴⁸ *National Airlines, Inc., Statement of Tentative Findings and Conclusions*, CAB Order No. E-6344, April 21, 1952, pp. 2-3; *Delta Air Lines, Inc., Mail Rates, Latin American Operations, Statement of Provisional Findings and Conclusions*, E-7738, September 21, 1953, pp. 7-15 (see excerpts quoted at pp. 35-36, *supra*); *Braniff Final Mail Rate Case*, Tentative Decision CAB Order No. E-7815, October 13, 1953, pp. 4-9, particularly p. 5 where the Board said "... the furtherance of the basic objectives of the Act, including the development of economically sound domestic and international air transportation systems and the avoidance of monopolistic control of United States international air transportation, requires the treatment of Braniff's international and domestic divisions as separate rate-making units."

⁴⁹ *Pennsylvania Central Airlines Corp., et al., Motions*, 8 C.A.B. 685 (1947); *aff'd. sub nom Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601 (1949).

⁵⁰ See excerpt from the Board's decision in the *Pennsylvania Central Airlines Case*, *supra*, n. 24.

Under these circumstances Petitioner submits that the court below was in error when it asserted that there was an established construction of the Act by the Board which would stand as any precedent to support the position of the Postmaster General in this proceeding. The contrary is the case. Prior administrative practice naturally led to the Board's rejection of the Postmaster General's demand that the Board was required, as a matter of law, to make the "offset" he requested. This administrative practice, geared, as it is, to the achievement of important objectives of the Act, should be accorded great weight by this Court in construing Section 406(b).

II. IF, CONTRARY TO THE CONTENTIONS OF PETITIONER, SECTION 406(b) OF THE ACT REQUIRES THE BOARD, IN FIXING MAIL RATES FOR A RATE-MAKING DIVISION, TO "TAKE INTO CONSIDERATION . . . THE NEED . . ." OF THE CARRIER AS A WHOLE, THEN THE BOARD'S ACTION SHOULD BE UPHeld AS A VALID EXERCISE OF ITS DISCRETIONARY AUTHORITY.

Introduction. In the preceding portion of this Brief the Petitioner has argued that the Board lacks the power to take the action which the Postmaster General has requested. If this Court does not agree, however, then Petitioner argues, alternatively, that the Board's decision should be upheld as a valid exercise of the discretionary authority delegated to it by Congress under Section 406(b) of the Act when, after taking into consideration the "need" of the air carrier as a whole, it concluded, for reasons of public interest, which are within the objectives of the Act, that the mail rates for the international division should be fixed without any offset to reflect in such rates any part of the domestic earnings.

Before presenting this argument (in Section B below) it is necessary to discuss the question of whether there is a body of "excessive" earnings in the domestic division, as the Postmaster General contends. This must be done because it is only within the framework of an understanding

of what the Board actually did in the proceeding below that it can be determined whether the Board properly exercised its discretionary authority. In Section A below, therefore, Petitioner analyzes this matter and argues that there is not now, and never has been, a specific body of earnings which the Board has determined to be "excessive" over what the carrier "needed" for its domestic system. Much of the error which Petitioner claims was committed by the court below can be attributed to the assumption that there is such a body of legally determined "excess" earnings,⁵¹ and to a misconstruction of the manner in which the Board below exercised the authority delegated to it by Congress in Section 406(b) of the Act.

A. At no time was there any finding by the Board in the domestic division of C&S that the carrier's "need" was limited to a return of 7.4%; or that any earnings, under the sliding-scale future mail rates therein fixed, would be excessive; and, therefore, there is no automatically determinable "corpus" of "excess" earnings as the court below assumed.

As shown in the Statement,⁵² the Board in 1948 fixed "need" mail rates in the domestic division of C&S to operate from January 1, 1948, forward. The Board did not find just one rate fair and reasonable. It found that, subject to the inevitably changing circumstances of the future, and with a particular view toward providing the management of C&S with incentive itself to change for the better certain of those circumstances (such as load factors and cost levels), a "sliding-scale incentive mail rate formula" ⁵³ should be established. The Board said that this:

⁵¹ It is to be noted that there was no necessity to discuss the nature of the earnings on the domestic division (which the Postmaster General claims were "excessive") in Part I, above. This was true because, regardless of whether or not a portion of the domestic earnings realized had been legally declared "excessive", Petitioner claims in Part I that the Board lacked the power to deal with them in the international division proceeding.

⁵² *Supra*, pp. 5-8.

⁵³ 9 C. A. B. 786, 810-812.

"... sliding-scale incentive mail rate formula ... will fix a mail rate which will be *reasonable* in terms of an attainable passenger load factor and will decline with increases in the passenger load factor at a rate designed to allow a progressive increase in the profit earned by C&S." (Emphasis supplied.)⁵⁴

The Board's Appendix 12 to its opinion sets forth 27 airplane mile rates at 1 percent interval changes in the passenger load factors ranging from 55% to 81%,⁵⁵ and in the Board's Order, it stated:

"It is Ordered, That the fair and reasonable rates of compensation to be paid Chicago and Southern Air Lines, Inc. . . . are hereby fixed, determined, and published to be as follows:

"... For each month during which the average passenger load factor . . . does not exceed 56.99 percent, a base rate of 34 cents per airplane mile; for each month during which the average passenger load factor exceeds 56.99 percent, a base rate per airplane mile which shall be less than 34 cents by 1.05 cents per airplane mile for each 1 percent, or fraction thereof, by which the average passenger load factor exceeds 56.99 percent, provided that in no event shall the base rate per airplane mile be less than 8.5 cents; . . ." ⁵⁶

Thus, the Board did not find just *one* mail rate fair and reasonable; it found an infinite number of rates derived from the formula between the stated maximum and minimum ceiling and floor to be *fair and reasonable*. No action by the Board in the domestic proceeding ever changed this finding.

⁵⁴ 9 C. A. B. 786, 811.

⁵⁵ 9 C. A. B. 786, 826.

⁵⁶ *Ibid*, at 786-787. There was a change reflected in the base rate to take effect on and after the carrier extended its international services beyond Havana, Cuba (due to adjustments in allocations between foreign and domestic costs and investment) but no change in the formula. The Board's Order placed these rates in effect. 9 C. A. B. 786-787.

As shown in the Statement,⁵⁷ the rate of return on investment was estimated by the Board to be 3.6% at a 55% load factor, 7.3% at a 60% load factor, and 13.1% at a 70% load factor. C&S had estimated a load factor of 60.09% for the future.⁵⁸ Admittedly, such an estimate could not be infallible. The Board accepted it; and then stated:

“... We have adapted this load factor to a sliding-scale mail rate formula which permits the mail rate to vary inversely with changes in the passenger load factor and thus compensate to a substantial extent for any errors in the forecast of load factors.”⁵⁹

Actual earnings for the 1948-1950 period in question in domestic operations, reflecting commercial revenues and compensation under these mail rates as reported to the Board amounted to a 12.5% return on domestic investment (R. 19, 53).⁶⁰ The Postmaster General seizes upon the difference between a 7.4% return which, under the 1948 estimates would have been earned under static conditions at the C&S forecast load factor, and the resulting actuality of a 12.5% return (such difference being approximately \$654,000.) and labeled it “excess” earnings. He has erred in his construction of the facts. As shown by the Board’s Order quoted above, the infinite number of rates between the ceiling and the floor established were found to be fair

⁵⁷ *Supra*, n. 5.

⁵⁸ This, under the formula and estimates, would have produced a 7.4% return.

⁵⁹ 9 C. A. B. 786, 805-806.

⁶⁰ Actually, the improved showing was achieved through economies effected (specifically encouraged and hoped for by the Board—*supra*, n. 5, last paragraph) through accounting adjustments not represented by dollar income—and through the sale of equipment as shown by a stipulation filed with the Board. (R. 65) (See, also, p. 3, n. 1, in the brief of the Board to the court below). This stipulation, reporting operating net profit and investment of the domestic division for the 1948-1950 period, did not have any bearing upon the question of what was in excess of “need” because, under the Act, only the Board can determine “need”.

and reasonable. The amount actually earned was within those limits.⁶¹

There is absolutely no basis for giving this amount of \$654,000, composed in a substantial part of accounting adjustments (R. 65), any status as "excess", or "excessive", or as having any legal significance as being outside the range of rates fixed by the Board to be fair and reasonable—because it is not.⁶²

⁶¹ The Postmaster General stated in his brief to the court below (p. 9):

"... In the instant case the Board awarded domestic 'need' subsidy which it estimated would yield a return after taxes for the years 1948-1950 of 7.4% on property allocable to domestic operations. In fixing foreign subsidy pay, it gave the carrier a 7% rate of return after taxes for those years. Thus the Board in effect found that C&S 'needed' a 7.4% return on domestic and a 7% return on foreign operations."

As indicated above in the text, there is no such finding by the Board.

⁶² The Board has recently so stated specifically. C&S was merged into Petitioner on May 1, 1953. This necessitated a new rate proceeding for the international division. In the proceeding in that matter, although as a result of the merger all subsidy requirements have been eliminated in the domestic division, the Postmaster General is contending that all estimated earnings over what will produce some minimum rate of return on domestic investment should be used to finance the estimated international future "need" of the merged carrier in the international division. In commenting upon the relationship of the decision of the court below to that problem, the Board, referring to the fact that the court below had reversed the Board and held that it "had erred in not offsetting the 'excess' earnings generated by the domestic division against the need of the international division in fixing mail rates for the latter operation", stated in a footnote:

"The term 'excess' earnings or profits, as that term was used in the Board's opinion in the *Chicago and Southern* case, in the opinion of the Court of Appeals, and here, refers only to earnings in excess of a stated rate of return on investment. The Board had no occasion to determine in the *Chicago and Southern* case, and the Board does not determine here, how much, if any, of these 'excess' earnings should be considered as excessive in the sense that these earnings are available for or should be offset against the mail rate for the international division, since in both the *Chicago and Southern* case and in this case the Board's decisions rest upon a policy determination to treat the domestic and international divisions as entirely separate for rate-making purposes, including the fixing of final class rates applicable to more than one corporate air carrier. A determination that earnings are excessive in this latter sense obviously requires more than a mere subtraction of actual or estimated profits from

B. The Board in the proceeding below did "take into consideration" the "need" of the air carrier as a whole and its decision was a valid exercise of its discretionary authority.

The Postmaster General's contention is that in fixing rates for the international division of C&S in 1951, the "need" of the carrier as a whole must be taken into consideration. The court below appears to have adopted his contention (R. 71).⁶³

If the Act is to be construed as requiring this, the decision of the Board in the proceeding below fully complies with the requirement.

In its Statement of Tentative Findings and Conclusions adopted May 18, 1951, in the proceeding before the Board (R. 6-50), the Board expressly referred to the existence and amount of the domestic earnings of C&S (R. 19). It then discussed at length in the Statement the relationship of those earnings to the international rates which should be fixed for C&S in the light of public interest factors which the Board analyzed and felt were pertinent to a determina-

an estimated rate of return on investment. See, e. g., our opinion in the *General Fare Investigation Case*, Order No. E-7376, May 14, 1953."

Delta Air Lines, Inc., Mail Rates, Latin American Operations, Statement of Provisional Findings and Conclusions, CAB Order No. E-7738, adopted September 21, 1953, p. 6, mimeographed copy, n. 10.

As noted above, there is no legal basis for saying that there was any earnings in "excess" of the "need" of C&S in its domestic division in the 1948-1950 period. However, the court below erroneously thought differently. On the assumption it made, it was easy to take a second step in error and apply such an assumed "excess" in reduction of international division "need". This was particularly easy to do in the light of the way the court below erroneously quoted the statute by making "take into consideration" apply to "all other revenue" rather than to "need" as the statute reads (see *supra*, n. 12).

⁶³ However, the effect of the decision of the court below is to deny the Board's power to determine the carrier's "need". The court directs that \$654,000 of the domestic earnings are to be regarded as in excess of the carrier's domestic "need" for the 1948-1950 period. This is an unauthorized invasion by the court of a question committed by the Act to the Board's discretion. In considering the "need" of the carrier as a whole in fixing rates in 1951, the Board clearly is authorized to make an overall determination of the actual "need", as it appeared in 1951.

tion of the relationship of the domestic earnings to the rate to be fixed for the international services (R. 19-20).

In its subsequent final opinion and order fixing the international division mail rates, the Board reviewed again the relationship of the actual domestic earnings to the international rates to be fixed and the considerations of public interest involved in the alternative methods of treating such earnings in fixing C&S's international division rates (R. 53-55).

The Board's extensive consideration of the domestic earnings of C&S in the international rate proceeding below coupled with its consideration of the C&S international division clearly was a consideration of the "need" of C&S as a whole.

In its opinions in the proceeding below, the Board made detailed findings with respect to the factors of public interest which it found to be pertinent to the determination of the relationship of the domestic earnings to the international rates to be fixed. It concluded that to determine that domestic earnings should be used to sustain international operations would have serious consequences, undesirable from the point of view of the public interest (R. 55). Specifically the Board expressly considered the treatment of the domestic earnings in the light of the following factors: (1) That the international services are almost invariably weaker than domestic services and the offset would, therefore, economically burden the domestic operations (R. 54); (2) that if the domestic air system can be kept financially sound, the public must ultimately benefit (R. 54); (3) that if the carriers' domestic earnings position continues strong, reductions in the domestic fare level will be possible (R. 54); (4) that with improved domestic earnings, carriers operating domestic services should be able to benefit the public and themselves with more modern aircraft and with improved methods affording safer and more efficient operations (R. 54); (5) that to allow international operations "to be carried on the back of domestic opera-

tions," would subject the latter to "an unjustifiable strain" (R. 54); (6) that it was desirable to maintain the comparable status between domestic operators which have foreign routes as against those which do not have foreign routes, in order to permit the fixing of uniform domestic mail rates for groups of carriers and thus create conditions more favorable to efficient operations (R. 54-55); and (7) that the offset principle would establish an undesirable "cost-plus" system of rate-making for C&S and other carriers operating both types of service (R. 19-21).

The Board concluded as a result of this consideration that the domestic earnings should not be "offset" in fixing the international rates and it fixed such rates on the basis of such consideration and that conclusion (R. 55, 58-59).⁶⁴

The statutory directive in Section 406(b) against which the above consideration by the Board must be measured is not a narrow, mechanical one: but is a directive that the Board shall "take into consideration . . . the need" of the air carrier for compensation sufficient to enable it "to maintain and continue the development of air transportation" in accordance with the statutory objectives. The implementation of such a Congressional mandate is not something which can be done by any rigid formula or with mathematical precision. On the contrary, the very scope of the directive indicates clearly that by Section 406(b) the Congress intended to give the Board the broad measure of discretion necessary to bring into play in the determination of "need" and the fixing of mail rates all considerations of

⁶⁴ In its final opinion below the Board expressly said that it was "not deciding the question of our legal power to make such an offset" (R. 55). In view of this, since, after reviewing in the opinion the facts with respect to C&S's earnings and needs the Board decided that C&S should retain the domestic earnings, it takes such earnings into consideration in the sense that the existence and effect of such earnings was a part of the process of decision. The conclusion is inescapable that the Board decided that C&S needed its actual domestic earnings. Had the Board decided otherwise it would have been necessary for the Board to decide the question of its legal power to make the offset.

public interest which the Board should find to be in furtherance of the statutory objectives.

The soundness of this approach to the meaning of Section 406(b) is clearly confirmed by the general breadth of the discretionary authority given to the Board by the Act as a whole. Any effort to limit the wide sweep of discretion reposed by Congress in the Board when, in the determination of mail pay, the Board is authorized to "take into consideration" the "need" of the air carrier "sufficient . . . to enable", among other things, the maintenance and continuance of the development objectives of the Act, is utterly inconsistent with the entire scheme of the Act.⁶⁵

To begin with, Congress has set forth in Section 2 of the Act basic purposes thereof which it has required that the Board "shall consider" in "the exercise and performance of its powers and duties under this Act" which would include, of course, the duty to fix mail rates under Section 406 of the Act.⁶⁶

An analysis of other broad grants of authority to the Board by Congress points up the broad area of judgment and discretion which it must exercise. Thus Congress gave the Board power over the establishment of routes,⁶⁷ passenger and property fares and rates in domestic air trans-

⁶⁵ The basic nature of rate-making under any statute involves a broad ambit of discretionary authority on the part of the rate-making agency. As this Court said in *Board of Trade v. United States*, 314 U.S. 534, 546 (1942):

"The process of rate-making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

⁶⁶ The Court of Appeals for the District of Columbia Circuit has noted that the provisions included in Section 2 under the title of "Declaration of Policy" are "peremptory" and "are as much an enactment by the Congress as is any other section of the statute." *American Airlines, Inc. v. Civil Aeronautics Board*, 192 F. 2nd 417, 420 (D. C. Cir. 1951).

⁶⁷ Sec. 401 and 416 (b), 49 U. S. C. 481, 496 (b), domestic routes. As to international routes, see *supra*, n. 28.

portation,⁶⁸ mergers, consolidations, and acquisitions of control,⁶⁹ interlocking relationships,⁷⁰ power to dispense with the operations of the "antitrust laws"⁷¹ and the responsibility to provide financial assistance where necessary to maintain and continue the development of air transportation through "need" mail rates.⁷² The Board even has the power to grant exemptions under certain circumstances from the provisions of the economic regulation Title of the Act.⁷³

The vast scope and magnitude of the discretionary power intended to be conferred by the Congress thus emerges. Under Section 2 of the Act, the Board must, in connection with exercising its power to set mail rates, among other factors, consider the "encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." This is not a simple assignment. It is one for expert judgment by the Board and requires consideration not only of the effect of any proposed action upon the individual carrier or carriers concerned, but the effect upon other carriers and upon the public.⁷⁴

⁶⁸ Sec. 1002 (d), 49 U. S. C. 642 (d).

⁶⁹ Sec. 408, 49 U. S. C. 488.

⁷⁰ Sec. 409, 49 U. S. C. 489.

⁷¹ Sec. 414, 49 U. S. C. 494.

⁷² Sec. 406, *infra*, Appendix.

⁷³ Sec. 416 (b), 49 U. S. C. 496 (b).

⁷⁴ In the second to last paragraph of the opinion of the court below, it notes its decision in *Summerfield, Postmaster General, et al. v. Civil Aeronautics Board*, Nos. 11259 and 11324 in which, in an opinion by Judge Prettyman, it held that profits derived by Western Air Lines, Inc. from the sale of an air route certificate with operating equipment cannot be excluded from revenue for the purpose of providing an industry incentive. The Court then states that "we see no essential difference between that case and this." (R. 72)

It is not clear whether the court below was thereby intending to incorporate by reference as one of the grounds for its decision in this case its holding in the *Western Case* that the Board cannot, in determining mail rates, con-

It would be completely inconsistent with the broad ambit of discretionary power delegated to the Board by Congress in the Act, as well as with the broad discretionary language of Section 406(b) itself, to conclude that the consideration given to the "need" of C&S by the Board in its decision below was not a lawful and appropriate discharge of its responsibility to "take into consideration" the "need" of C&S for mail compensation sufficient to enable it "to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

sider the development of air transportation generally but must focus upon the development of the single carrier or carriers before it in an individual proceeding. Judge Prettyman, who wrote the opinion in the *Western Case*, stated in his dissent in this case that he did not find the problem of the *Western Case* in the present case." (R. 73-74). Petitioner submits that Judge Prettyman was right for, as indicated above, many of the findings upon which the Board based its decision relating to the "need" of C&S were findings directly affecting C&S alone. Petitioner also submits, however, that the holding in the *Western Case* is in error. Broad questions of national air transportation policy and their effect upon the public obviously must be considered in the determination of mail rates if the objectives of the Act are to be achieved. Reference to the Declaration of Policy in Section 2 of the Act indicates that Congress never had a "keyhole" approach under which elements entering into the "need" of a carrier "to maintain and continue the development of air transportation" could fail to encompass the entire air transportation system of the nation. Such a narrow view has surely never been held in the rate-making tradition where the effect of a proposed rate upon the public interest has always been an element in rate making. *Baltimore & Ohio R. Co. v. United States*, 345 U. S. 146, 150 (1953); *King v. United States*, 344 U. S. 254, 263, 264 (1952).

CONCLUSION.

For the foregoing reasons, it is respectfully urged that the judgment of the court below should be reversed, and the orders of the Board of which review is sought, affirmed.

Respectfully submitted,

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November 17, 1953.

APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938¹, as amended, are as follows:

DECLARATION OF POLICY

SEC. 2. In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

¹ Act of June 23, 1938, c. 601, 52 Stat. 977, as amended, 49 U.S.C. 401, et seq.; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F.R. 2421.

RATES FOR TRANSPORTATION OF MAIL

Authority to Fix Rates

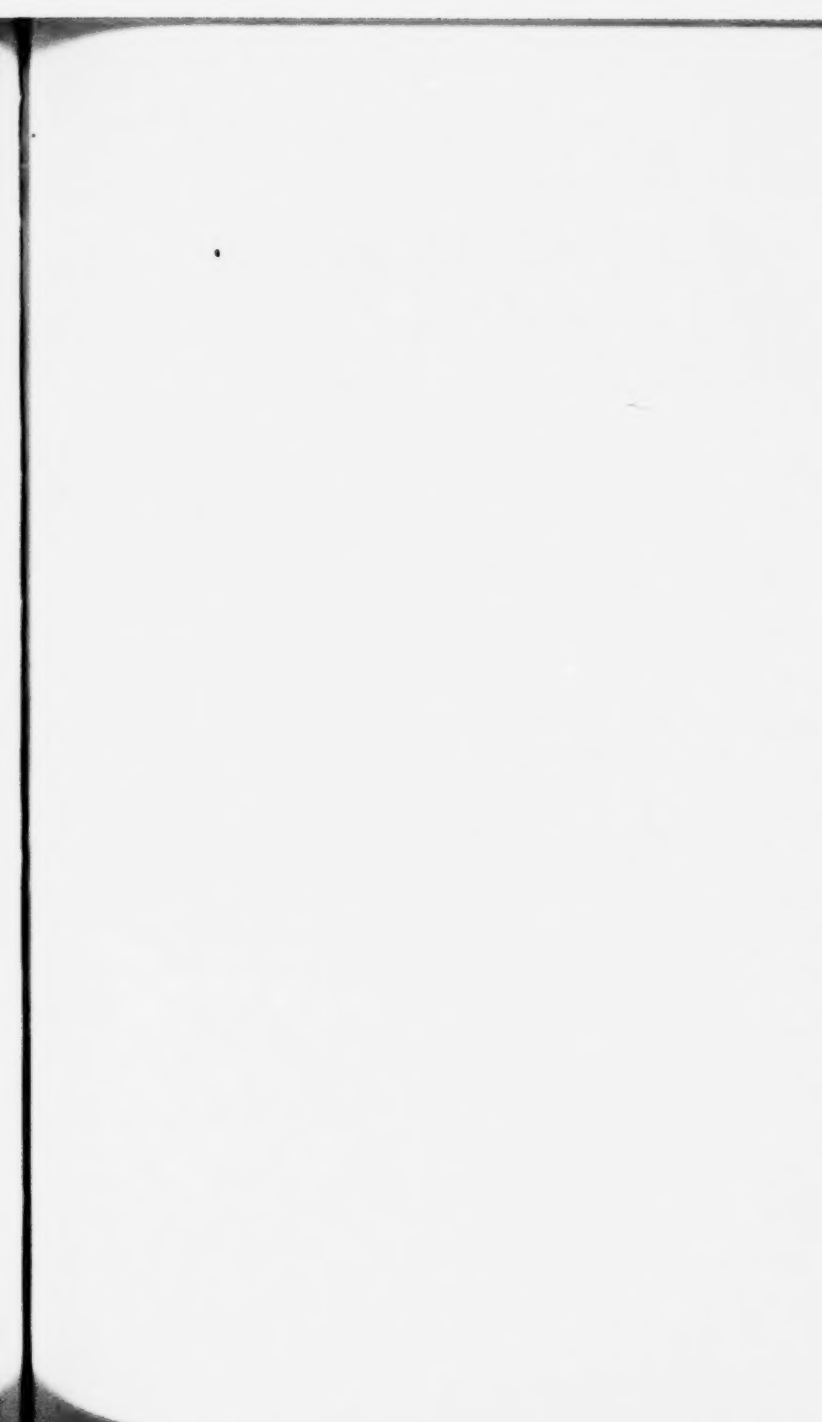
SEC. 406 (a) The [Board] is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Rate-Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the [Board], considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the [Board] shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation⁷ of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such

⁷ So in original.

air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.



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HAROLD B. WILLEY, CL

IN THE
Supreme Court of the United States

October Term, 1953

No. 223

DELTA AIR LINES, INC., *Petitioner,*

v.

**ARTHUR E. SUMMERFIELD, Postmaster General of the United
States, and THE UNITED STATES OF AMERICA, on behalf
of the Postmaster General, *Respondents.***

**On Writ of Certiorari To The United States Court of Appeals
For the District of Columbia Circuit**

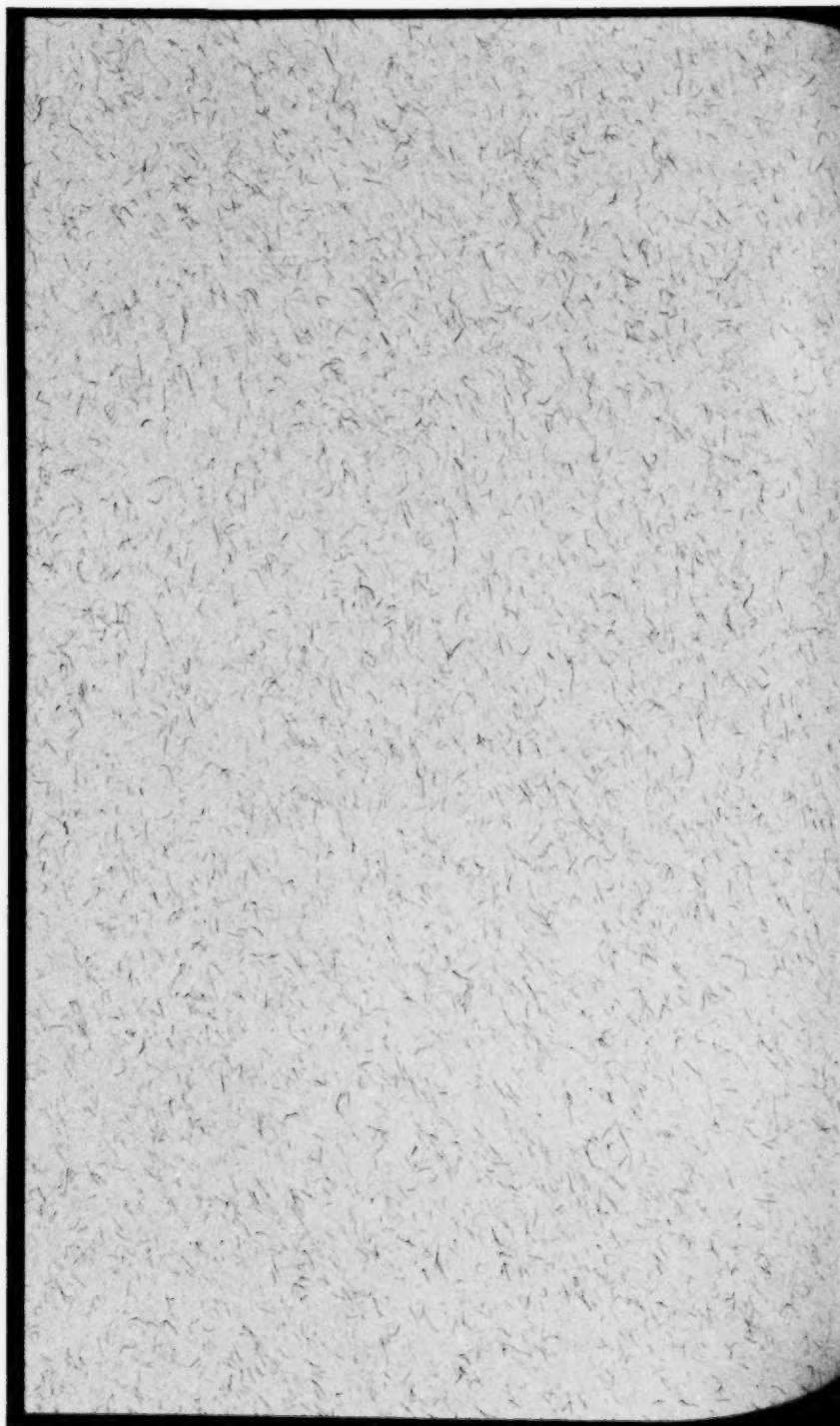
REPLY BRIEF FOR THE PETITIONER

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ARTHUR E. SUMMERFIELD, Postmaster General of the United States, and **THE UNITED STATES OF AMERICA,** on behalf of the Postmaster General, *Respondents.*

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

Certain of the statements and assumptions made in the Postmaster General's Brief¹ require corrective comment.

¹ Herein the Brief for the Postmaster General will usually be referred to as "Res. Br."; the main Brief for Petitioner Delta as "Pet. Br."; the Brief for the Civil Aeronautics Board as "Board Br."; and the Brief for the *Amici Curiae* as "Amici Br."

A. The "In Excess of Need" Argument.

The Postmaster General's first question reads:

"Whether Section 406(b) of the Act empowers the Board to award subsidy in the form of 'need' mail pay which exceeds the carrier's actual 'need' " (Res. Br., p. 3).

This is a self-answering question. Obviously, the answer is "no". The error in the question is in its assumptions.

It assumes that the "fair and reasonable" rates fixed by the Board in 1948 for the domestic division of C&S² would cease to be "fair and reasonable" if operations while they were in effect resulted in a return of more than 7.4% on the investment allocated to the domestic division in any future period;³ it assumes a finding of "need" by the Board limited to such a 7.4% return (Res. Br., p. 21; and see, Pet. Br., p. 52, n. 61); and it assumes that the Board thus established a floor geared to such a 7.4% return which would automatically give a legal status to all earnings from commercial and mail pay revenues above that floor as being outside and beyond the "need" of the domestic division and in excess of the "fair and reasonable" rates established therefor.

These assumptions are completely groundless. There is no basis for identifying any amount of the 1948-1950 domestic division earnings from commercial and mail pay revenues under final mail rates as having any legal status outside the fair and reasonable rates fixed in 1948 by the Board (Pet. Br., pp. 48-52).

² There were 27 rates set forth in the Board's opinion which varied with differing load factors between the highest and the lowest rates established by the Board. *Chicago and Southern Air Lines, Inc., Mail Rates*, 9 C.A.B. 786, 826 (1948).

³ The Board did not build any specific rate of return into the rates fixed. It expected the carrier's rate of return to vary not only with load factors experienced but also with economies resulting in lowered costs and higher earnings for the carrier (Pet. Br., pp. 7-8, including, particularly, n. 5, last paragraph).

The question further erroneously assumes that "actual 'need'" is a sharply limited, precise amount and that the Board's discretion in determining "need" is severely restricted.⁴ There is no difference between "need" and "actual need". Furthermore, the Congress intended that the Board should have broad discretion in determining "need" in order to be able to achieve the important national objectives set forth in Section 406(b) (Pet. Br., pp. 55-58).

B. The Irrelevant Rate of Return Comment.

The Postmaster General's Brief states (Res. Br., pp. 15-16):

"The fact is that the carrier here is complaining because its subsidy from the public treasury is limited to an amount which gives it an overall return after taxes of 7.3% on its invested capital..."

This statement leads the mind to believe that Delta is reaching for exorbitant subsidy payments from the Government yielding an abnormally high rate of return. This is not correct. The fact is that Delta is contesting the legal right of the Postmaster General, who, having failed to challenge for some three years the fair and reasonable final mail rates established in 1948 on C&S's domestic division, now asserts that the Board's action in setting such final rates on the domestic division in 1948 should be given no final significance and that C&S's mail pay should now be readjusted retroactively on a system basis. Furthermore, as noted in footnote 3 above, in the 1948 proceeding, the Board specifically recognized that varying rates of return would be achieved upon the domestic division depending upon cost economies and/or load factors attained.⁵

⁴ See also, Res. Br., p. 20.

⁵ Indeed, as will be pointed out in further detail below, there is never a guarantee that a rate of return established in a proceeding setting a *future* mail rate will be achieved because it is impossible

The reasonableness of these rates of return, a matter for the Board's discretion and unchallenged by the Postmaster General, is not an issue in this proceeding.

C. The Postmaster General's View of Subsidy.

The extensive reference to amounts of subsidy provided under the Act during the past 18 years to air carriers (Res. Br., p. 14, n. 9) and to C&S in particular (Res. Br., p. 19, n. 16) is entirely diversionary and beclouds the question of the true Congressional intent as to the proper construction of Section 406(b) of the Act. If these references are designed to express a disagreement by the Postmaster General with the policy already established by Congress of empowering and directing the Board to provide subsidy in mail rates where necessary to enable air carriers to maintain and continue the development of air transportation in accordance with national objectives, these arguments should be addressed to Congress, not to this Court.⁶

D. The "Bounty" Concept.

The Postmaster General's Brief (p. 28) suggests that the Board's construction of the Act would allow it to go astray to make up losses on one of three hypothetical

to forecast revenues and expenses with such a degree of exactitude. The result has been a considerable variation in rates of return. Thus the trunkline carriers average return on investment in domestic services has varied from 2.3% in 1938 (the year the Act was passed), to a high of 20.3% in 1942, to a net loss of \$17,351,000 for the years 1946 through 1948, to 14.3% in 1952. The average for the entire 1938-1952 period was 8.3%. *General Passenger Fare Investigation*, Docket No. 5509, CAB Order No. E-7376, decided May 14, 1953, mimeographed opinion, Appendix A.

⁶ It is Petitioner Delta's view, however, that the policy of Congress in supporting the air transportation during its infant days of development has borne fruit. All of the ten major trunk airlines in this country are now off subsidy in domestic operations (Pet. Br., pp. 38-39; and see, Board Br., p. 24) and receive only a mail rate designed to compensate them for carrying the mail. During 1952 these ten air carriers performed 97.8% of the total domestic revenue ton-miles performed by certificated trunkline air carriers (C.A.B. Recurrent Report of Mileage and Traffic Data).

domestic divisions of an air carrier even where the other two were extremely profitable. And he actually states:

“... Under the Board’s theory, all that would be required to justify such a bounty would be a reasonable basis for employing a separate proceeding for fixing subsidy for the unprofitable divisions.” (Res. Br., p. 28).

The Board is in charge of classifying rate-making units. It has classified and re-classified rate-making divisions where public interest so required.⁷ The implication that the Board would default in its public duty is insupportable. No such issue has been even remotely raised in this case.

E. The Repudiation of Traditional Rate-Making Argument.

The Postmaster General’s Brief says that “... in any realistic sense, these are not rate proceedings at all ...” (Res. Br., p. 13).

As late as 1949 this Court in the strongly contested *TWA Case* held directly to the contrary.⁸

The Postmaster General’s Brief attempts to distinguish the *TWA Case* by asserting that it “... held only that the Board has no power...retroactively to revise a closed domestic *service* rate for the period prior to the filing of a petition to fix a new rate...” (Res. Br., p. 13).

The attempted limitation of the holding of the *TWA Case* to a “service” mail rate as opposed to a “need” mail rate is not justified under Section 406 of the Act which makes no such distinction. Nor did this Court make such a distinction in the *TWA Case*. In fact, the language upon

⁷ Five air carriers which conduct both domestic and international or overseas operations are classified on a system-wide rather than a divisional basis for rate-making purposes (Board Br., p. 22, n. 9; and see, *Amici Br.*, footnote on p. 18; and see, *Pet. Br.*, pp. 22-23, and particularly n. 16).

⁸ *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601, 605, 606, 607 (1949). The office of the Solicitor General was on the Brief for the Civil Aeronautics Board in the *TWA Case* urging this Court to so hold.

which that case turned⁹ occurs in Section 406(a) dealing with rates generally. Section 406(b) fits "need" rates directly into Section 406(a) when it says "...In determining the rate in each case, the [Board] shall take into consideration, among other factors...the need of each such air carrier..." (Pet. Br., Appendix).

F. The Guarantee Argument.

The Postmaster General's Brief (pp. 42-44) undertakes to minimize the point that the decision below jeopardizes the continuance in international operations of air carriers engaged in both domestic and substantial international services;¹⁰ and in this effort he states:

"The argument thus comes down to this: carriers are likely to give up a business in which, under the Board's current policy, the Government guarantees them ten percent after taxes..." (p. 44).

The Government does no such thing. In fixing mail rates for past periods in the international field, the Board allows 7% as it did here. For future periods it currently fixes final rates *estimated* to yield 10% in this field; but the carrier is not guaranteed anything under final future rates. It will almost never realize the estimates exactly. It may make more if it excels in efficiency or traffic, or both; or it may make less or even sustain a loss. There is no guarantee.¹¹

⁹ That the Board is empowered and directed, after fixing and determining fair and reasonable rates, "... to make such rates effective from such date as it shall determine to be proper..." (Pet. Br., Appendix).

¹⁰ See Board Br., pp. 20-30; Pet. Br., pp. 30-37; Brief of *Amici Curiae*, pp. 25-26.

¹¹ If the Act were administered so as to result in there being a guarantee, it would embody a cost-plus system of regulation which this Court has held "would not harmonize with the apparent design of the Act." *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601, 606 (1949). In another case, in which certiorari was denied by this Court, the United States Court of

G. The Prior Practice of the Board.^e

The Postmaster General's Brief (p. 24) asserts that until the decision in the instant case the Board consistently has determined "need" for the carrier as a whole.

This is incorrect. In the Board's action in 1948 in fixing fair and reasonable rates for the domestic division of C&S it did not determine the "need" of C&S as a whole.¹² It has not done so in fixing the domestic division fair and reasonable mail rates for Braniff or Northwest or TWA. It has never done so in a case comparable to the instant case.¹³ The Brief quotes a decision of the Board in which it stated that "The 'need' . . . is that of the air carrier as a whole and not that of any particular geographical division of its operations.", and it then states:

" . . . This view was specifically reasserted in a number of subsequent cases involving subsidy mail pay for both domestic and international operations . . ."
(Res. Br., p. 24).

It then cites numerous Board cases with the word "domestic" or "international" in parenthesis after the citation. None of the cases cited involve a carrier with domestic and international divisions separately classified for rate-making purposes.

The Postmaster General's Brief in relying again on the Board's practice in *Chicago and Southern Air Lines, Mail*

Appeals for the District of Columbia Circuit said: " . . . The Act, with its regulatory provisions, is not intended to underwrite profitable operations of a carrier's business, any more than statutes imposing regulation of public utilities are intended to insure them a net revenue. . . ." *Capital Airlines, Inc. v. Civil Aeronautics Board*, 171 F. 2nd 339, 340 (1948), cert. denied, 336 U.S. 961 (1949).

As to the validity of the far-reaching jeopardy claim affecting this nation's vital international air policy, see the Board on this point as quoted in Pet. Br., pp. 35-36; and see the references in n. 10 above.

¹² *Chicago and Southern Air Lines, Inc., Mail Rates*, 9 C.A.B. 786 (1948).

¹³ See also, Pet. Br., pp. 46-48, including ns 45 and 46.

Rates for Routes Nos. 8 and 53, 3 C.A.B. 161 (1941) and *Pan American Airways, Alaska Mail Rates*, 6 C.A.B. 61 (1944) fails completely to meet the distinguishing characteristics of those cases as discussed in Petitioner Delta's Brief (pp. 43-46). In fact, it would be completely at variance with the Board's prior administrative practice to do what the Postmaster General here urges.¹⁴

H. The "No Inconsistency" Argument.

The Postmaster General's Brief states that:

"There is no inconsistency in permitting the Board to conduct separate administrative proceedings to fix a carrier's domestic and international subsidy, and at the same time limiting total subsidy awarded in both proceedings to the need of the carrier as a whole. Cf. *B. & O. R. Co. v. United States*, 345 U.S. 146 . . ." (Res. Br., pp. 28-29).

He then cites the *Pan American Cases* which Petitioner Delta distinguishes in its main Brief.¹⁵

The only judicial authority which the Postmaster General has relied upon for the above-quoted proposition is *Baltimore & Ohio R. Co. v. United States*, 345 U.S. 146 (1953). The holding of the *B. & O. Case* was that as long as "rates as a whole afford railroads just compensation for their over-all services to the public the Due Process Clause should not be construed as a bar to the fixing of non-compensatory rates for carrying" certain categories of fresh vegetables "when the public interest is thereby served." The case is not in point. First, there was no question there of setting rates on the basis of a territorial unit less than the company-wide system with separate consideration of allocated costs and investments to each territorial unit. Separate consideration by territorial units has

¹⁴ See discussions in Pet. Br., pp. 46-48.

¹⁵ Pet. Br., p. 44-46.

been specifically declared lawful by this Court on numerous occasions.¹⁶ Second, there was no question there of ascribing to a final and unchallenged rate in effect for three years a temporary quality as the Postmaster General here urges. This Court has specifically declared that a mail rate cannot be revised retroactively. *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601 (1949).

CONCLUSION

The judgment of the court below should be reversed, and the orders of the Board for which review is sought, affirmed.

Respectfully submitted,

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¹⁶ See Pet. Br., p. 25, citing *American Toll Bridge Co. v. Railroad Commission of California*, 307 U.S. 486 (1939) and *Wabash Valley Electric Co. v. Young*, 287 U.S. 488 (1933).

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SUPREME COURT OF THE UNITED STATES

Nos. 222 & 223.—OCTOBER TERM, 1953.

Civil Aeronautics Board, Petitioner,
222 *v.*

Arthur E. Summerfield, Postmaster
General of the United States, and
the United States of America, on
behalf of the Postmaster General.

Delta Air Lines, Inc., Petitioner,
223 *v.*

Arthur E. Summerfield, Postmaster
General of the United States, and
the United States of America, on
behalf of the Postmaster General.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[February 1, 1954.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Delta Air Lines, petitioner in No. 223, is the successor by merger to Chicago and Southern Air Lines (C & S). C & S was an air carrier which conducted both domestic and foreign operations prior to the merger. The present case involves subsidy mail pay for its foreign operations from 1946 through 1950.

In 1948 the Board, on applications made by C & S in 1944 and 1945, fixed a prospective annual subsidy for its domestic operations beginning January 1, 1948, which the Board estimated would yield a net return after taxes of 7.4 percent on that part of its investment allocable to those operations. 9 C. A. B. 786. The following three years—1948, 1949, and 1950—the rates in operation produced a subsidy of more than \$654,000 in excess of a 7.4 percent return.

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In 1946 C & S applied for subsidy mail pay on its Latin American routes. On October 18, 1951, the Board issued its opinion and order. Rates were fixed retroactively from November 1, 1946, to December 15, 1950, and prospectively from December 16, 1950. The subsidy awarded was designed to give the carrier a 7 percent return, on the property allocable to foreign operations, after taxes for the past period, and 10 percent for the future.

In fixing the subsidy for the past period the Board refused to offset against the carrier's need for foreign operations the excess earnings on its domestic flights. It gave two "considerations of economic policy" for that position.¹ First, the Board said it would put

¹ The Board said:

"If an offset policy were adopted, the almost invariable result would be that, as in the instant case, the profits from a carrier's domestic operation would be used to sustain any international operations it might have. Recognizing this likelihood, we hesitate to burden the more robust segment of the industry with the obligations of the economically weaker part. For if the domestic air transport system can be kept financially sound, the public must ultimately benefit, putting aside any consideration of the obvious advantage of reduced rates of mail compensation. Thus, we anticipate that if the carriers' earning position continues strong, reductions in the domestic fare level will be possible, thereby giving impetus to the further development of the industry. In addition, with improved earnings, the domestic operators should be able to benefit the public and themselves with more modern aircraft, and with improved methods affording safer and more efficient operations. We cannot escape the thought that if we allow international operations to be carried on the back of domestic operations, we shall be subjecting the latter to an unjustifiable strain. Many of the domestic operators are well along the road to self-sufficiency. It is our duty to speed them on their way, not thwart them.

"It also appears desirable to maintain the comparative status between those domestic operators which have foreign routes as against those which do not have foreign routes. Since carriers fall into fairly well-defined classes, the Board is enabled to fix uniform domestic mail rates for groups of carriers provided, of course, that their com-

an "unjustifiable strain" on domestic operations if the latter were required to carry the international operations. Second, it concluded that regulatory ends would be better served by maintaining "the comparative status between those domestic operators which have foreign routes as against those which do not have foreign routes."

On the Postmaster General's petition for review the Court of Appeals reversed the Board. 207 F. 2d 207. The cases are here on certiorari and were argued with Nos. 224 and 225, decided this day.

As we have already noted in the companion cases, § 406 (a) of the Civil Aeronautics Act, 52 Stat. 998, 49 U. S. C. § 486 (a) directs the Board to fix "fair and reasonable rates of compensation for the transportation of mail by aircraft." Section 406 (b) provides that the Board in determining those rates

"shall take into consideration, among other factors, . . . the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with

parative status is preserved by excluding consideration of any international operations. A carrier operating under a class rate has every incentive to operate efficiently because it may retain any profits it earns in excess of the estimated return to be afforded by the uniform rate. It is also administratively desirable to preserve a comparative status between carriers because the Board has been able to analyze the operations of each carrier within a class in the light of the results achieved by others within the same class. The comparison technique of rate-making has proved to be the most satisfactory and practicable available to the Board. If we were required to fix rates for both domestic and international operations at the same time, it would be difficult, if not impossible, to find a suitable basis for a comparison technique of analysis.

"In view of the foregoing, we find that the earnings from C & S' domestic routes should not be used to offset the "need" resulting from the carrier's international routes. This conclusion stems from considerations of economic policy; we are not deciding the question of our legal power to make such an offset."

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all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."

The mandate is that the Board "shall take into consideration" what "the need" of the carrier is. The Act thus poses as the initial question for the Board whether the financial condition of the carrier is such that it needs a subsidy or has no need for one. The Board did not find that Delta had a "need" for an additional \$654,000. It merely concluded that those excess domestic profits should not "as a matter of economic policy" be taken into account in computing a subsidy for international operations. In that posture the decision of the Board seems not in conformity with the law.

The Board answers to the effect that under § 406 (b) it "may fix different rates for different air carriers or classes of air carriers, and different classes of services." It may, therefore, fix a rate for international service. Since it may do that, it may, consistently with rate-making decisions (see, *e. g.*, *American Toll Bridge Co. v. Railroad Commission*, 307 U. S. 486, 494) fix the rate at a level which will sustain the particular unit. Therefore the Board need do no more under § 406 (b) when it fixes a rate for international service than offset revenue attributable to the class of service for which the rate is made. That is the argument.

There are aspects of traditional rate-making that are carried over into the Act. Thus we held in *T. W. A. v. Civil Aeronautics Board*, 336 U. S. 601, that rates under the Act are made retroactive only to the date of the application. We also noted in that case that the "need"

clause in § 406 (b) is not wholly at war with traditional rate-making functions. *Id.*, p. 604. But the application of the "need" clause which the Board has made in this case is at war with the language of § 406 (b). The standard is "the need of each such air carrier." The "need" of the carrier is measured by the entirety of its operations, not by the losses of one division or department. The measure of "the need" is an amount of compensation necessary to carry the mail and "together with all other revenue of the air carrier" adequate for maintenance and development. And the Act defines "air carrier" as "any citizen of the United States who undertakes . . . to engage in air transportation" § 1 (2). Thus the wording of the Act precludes measuring "the need" of the carrier by any other unit than the carrier as an entity.

As we read the Act, Congress has established a special formula for the fixing of a subsidy rate. While the rate may be for a class of service, the return in form of a subsidy must be computed with reference to the entire operations of the carrier. The requirement is that the Board offset all of a carrier's revenues in determining the subsidy; there is no discretion in the Board to disregard any portion of the revenue because of economic or other policy considerations. In other words, an air carrier's subsidy need is an amount which, "together with all other revenue" of the carrier, will enable it to meet and maintain the objectives of the Act. The carrier's "need" is therefore a limiting factor in the sense that the subsidy may not exceed it. Since the Board did not construe and apply the Act in that manner, the Court of Appeals was correct in reversing the rate order.

The Board makes an extended argument of policy against that position in elaboration of the reasons it advanced for not offsetting the excess earnings from do-

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mestic operations against the international subsidy rate.² It maintains that maximum operating efficiency on the part of air carriers and the development of air transportation—prominent objectives of the Act³—will be better served by setting subsidy rates on a divisional rather than on a system basis. This may be so. But that is a matter of policy for Congress to decide. As we read § 406 (b) Congress adopted in the present Act a rate formula based on “the need” of the carrier as measured by its entire operations, even when a rate was being fixed for a class of service.

Affirmed.

² See note 1, *supra*.

³ Section 2 of the Act provides:

“In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

“(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

“(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

“(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

“(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

“(e) The regulation of air commerce in such manner as to best promote its development and safety; and

“(f) The encouragement and development of civil aeronautics.”

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